(1)

Supreme Court, U.S.
FILED

02 267 AUG 19 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court

OF THE

United States

CHRISTOPHER ALAN MORGAN,
Petitioner,

vs.

JOHN ROBINSON, CHIEF PROBATION OFFICER
WILLIAM DANIEL, DIVISION DIRECTOR
RON DE LA RIVA, PROBATION OFFICER
ORANGE COUNTY PROBATION DEPARTMENT
BILL LOCKYER, ATTORNEY GENERAL
STATE OF CALIFORNIA
Respondents.

On Petition for Writ of Certiorari to the
U.S. Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL B. DASHJIAN (Counsel of Record)
P.O. Box 3650
Paso Robles, CA 93447-3650
Telephone: (805) 239-4511
Facsimile: (805) 239-3315
Email: firm@dashlaw.com
Counsel for the Petitioner

150 pp

QUESTIONS PRESENTED (Rule 14.1(a))

1. Does 28 U.S.C. § 46(b) prohibit an assigned two-judge panel of a Court of Appeals from denying a certificate of appealability in a § 2254 or 2255 action ["COA"], and then denying a request for rehearing or a third judge?

2. (a) May a Court of Appeals, or judge or judges thereof, properly deny a COA application, when the order of the District Court denying a COA does not contain a valid statement of reasons under Fed. R. App. P. 22(b)?

2. (b) Is a summary District Court order denying a separate application for a COA, which states as its only reasons for denial that "the appeal is not taken in good faith for the reasons in the original District Court opinion," a valid statement of reasons under Fed. R. App. P. 22(b)?

3. May a Court of Appeals, or judge or judges thereof, properly deny a COA application, without either giving its own reason or adopting any of the conclusions in the District Court's denial of a COA?

4. (a) May a Court of Appeals, or judge or judges thereof, properly deny a COA application without stated reason, when the order issued by the District Court which denied a COA was issued in violation of jurisdictional laws such as 28 U.S.C. § 636 or Fed. R. Civ. P. 72?

(b) Is a District Court order denying a COA, which states that it was drafted by a Magistrate Judge and signed by a District Judge, but indicates no level of review by the District Judge and was part of an "off-docket" procedure with no notice, opportunity to object or order of reference, violative of any law described in 4(a) above?

5. Should a COA be issued to petitioner?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI 1

I. CITATIONS TO OPINIONS BELOW 1

II. JURISDICTIONAL STATEMENT 1

III. STATEMENT RE: 28 U.S.C. § 2403 2

IV. CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS 2

V. STATEMENT OF THE CASE 2
- A. Background; Procedural History 2
- B. Presentation Of The Federal Claims Below 4

VI. REASONS FOR GRANTING THE WRIT 6
- A. Question 1: Denial Of Three-Judge Panel (28 U.S.C. § 46(b)) 6
  - 1. Applicability Of 28 U.S.C. § 46(b); Contrary Practices Of The Ninth Circuit And Other Courts Of Appeals 6
  - 2. Reconciliation Of This Court's *Hohn* And *Burwell* Opinions; Construing The Relevant Statutes And Rules As An Harmonious Statutory Scheme ... 11
- B. General Considerations Re: Questions 2, 3 And 4 15
- C. Question 2(a): Lack Of District Court Statement Of Reasons (Fed. R. App. P. 22(b)) 16

D. Question 2(b): Inadequacy Of Standardized Or Boilerplate Statements Of Reasons 19
E. Question 3: Lack Of Court Of Appeals Statement Of Reasons 21
F. Question 4: Lack Of Indication That The Two-Judge Panel Meaningfully Considered Petitioner's Claims That The District Court's Order Denying A COA Was Issued Without Jurisdiction ... 24
G. Question 5: A COA Should Be Issued To Petitioner 27

CONCLUSION 30

APPENDIX:

Ex. A Order Denying Certif. of Appealability (9th Cir.) A-1

Ex. B Order Denying Motion for 3-Judge Panel, Petn. for Rehearing, and Rehearing En Banc (9th Cir.) ... A-3

Ex. C Order Denying Certif. of Appealability (Dist.Ct.) A-5

Ex. D Opin. of Magistrate Judge, As Adopted (Dist. Ct.) A-8

Ex. E Judgment (Dist. Ct.) A-35

Ex. F Opin. of California Court of Appeal A-37

Ex. G Order of Cal. Supreme Court Denying Review A-52

Ex. H Petitioner's Motion for 3-Judge Panel/Petition for Rehearing/Suggestion for Rehearing En Banc .. A-54

Ex. I Petitioner's Notice of Appeal to Ninth Circuit .. A-74

Ex. J Constitutional, Statutory, and Rule Provisions . A-78

TABLE OF AUTHORITIES

CASES

Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997) (per curiam) 24

American Construction Co. v. Jacksonville, T. & K.W. R. Co., 148 U.S. 372 (1893) 10, 15

American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 20

Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) 13

Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1963) 14

Barefoot v. Estelle, 463 U.S. 880 (1983) 14

Blyew v. United States, 13 Wall. 581 (1871) 7

Brown v. Booker, 622 F.Supp. 993 (E.D. Va. 1985) 17, 19

Camp v. Pitts, 411 U.S. 138 (1973) (per curiam) 21

Carafas v. LaVallee, 391 U.S. 234 (1968) 3

Cason v. Owen, 578 F.2d 572 (5th Cir. 1978) (per curiam) 25

Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991) 17

Christian v. United States,
404 F.2d 328 (8th Cir. 1968) (per curiam) 18

Columbia Record Productions v. Hot Wax Records, Inc.,
966 F.2d 515 (9th Cir. 1992) 26

Connecticut Light & Power Co. v. FERC,
627 F.2d 467 (D.C. Cir. 1980) 18

Coolidge v. Schooner California, 637 F.2d 1321
(9th Cir.), *cert. denied*, 451 U.S. 1020 (1981) 26

Davis v. Jacobs, 454 U.S. 911 (1981) 27

Dunlop v. Bachowski, 421 U.S. 560 (1975) 18

Estate of Conners v. O'Connor,
6 F.3d 656 (9th Cir. 1993),
cert. denied, 510 U.S. 1045 (1994) 25, 26

FDA v. Brown & Williamson Tobacco Co.,
529 U.S. 120 (2000) 12

Federal Power Comm. v. Pacific Power & Light Co.,
307 U.S. 156 (1939) 7

Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977) .. 16, 18, 25

Giangola v. Walt Disney World Co.,
753 F.Supp. 148 (D.N.J. 1990) 24

Gomez v. United States, 490 U.S. 858 (1989) 24

Great Northern R. Co. v. Sunburst Oil & Refining Co.,
287 U.S. 358 (1932) 5

Grubbs v. Derwinski, 2 Vet. App. 78 (1991) (per curiam) 14

Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979) ... 25

Herrera v. Payne, 673 F.2d 307 (10th Cir. 1982),
cert. denied, 469 U.S. 936 (1984) 16-19

Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979) 26

Hohn v. United States,
524 U.S. 236 (1998) 6-8, 10-15, 22, 27

Holiday v. Johnson, 313 U.S. 342 (1941) 26

House v. Mayo, 324 U.S. 42 (1945) 12

Hunter v. United States,
101 F.3d 1565 (11th Cir. 1996) (en banc),
cert. denied, 520 U.S. 1211 (1997)
(over'd in part on other grds., *Lindh v. Murphy*,
521 U.S. 320 (1997) 25

In re Burwell, 350 U.S. 521 (1956) (per curiam) 11, 12

In re Marriage of Nasca,
160 F.3d 578 (9th Cir. 1998) 24, 25

Jones & Laughlin Steel Corp. v. Gridiron Steel Co.,
382 U.S. 32 (1965) (per curiam) 20

Jones v. Johnson, 134 F.3d 309 (5th Cir. 1998) 25, 26

Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000) 15

Lindh v. Murphy, 521 U.S. 320 (1997) 25

Lozada v. Deeds, 498 U.S. 430 (1991) (per curiam) 22

Massey v. City of Ferndale, 7 F.3d 506 (6th Cir. 1993) .. 26

Missouri ex rel. Missouri Ins. Co. v. Gehner,
281 U.S. 313, (1930) 5

Moody v. Albemarle Paper Co.,
417 U.S. 622 (1974) (per curiam) 9

Murray v. Nat'l Broadcasting Co.,
35 F.3d 45 (2d Cir. 1994),
cert. denied, 513 U.S. 1082 (1995) 11

Northcross v. Board of Education,
412 U.S. 427 (1973) (per curiam) 21-23

Pacemaker Diagnostic Clinic v. Instromedix,
725 F.2d 537 (9th Cir.) (en banc),
cert. denied, 469 U.S. 824 (1984) 26

Payne v. Wingo, 442 F.2d 1192 (6th Cir. 1971) 26

People v. Kirk, 217 Cal.App.3d 1488 (1990) 28

Pioneer Properties, Inc. v. Martin,
776 F.2d 888 (10th Cir. 1985) 14

Redding v. Fairman, 717 F.2d 1105 (7th Cir. 1983),
cert. denied, 465 U.S. 1025 (1984) 17

Reynaga v. Cammisa, 971 F.2d 414 (9th Cir. 1992) .. 25, 26

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 12

Saunders v. Shaw, 244 U.S. 317 (1917) 5

Sibron v. New York, 392 U.S. 40 (1968) 3

Slack v. McDaniel, 529 U.S. 473 (2000) 6, 17, 23

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 24

Stern v. U.S. District Court,
214 F.3d 4 (1st Cir. 2000) 9

Stewart v. Beto, 454 F.2d 268 (5th Cir. 1971),
cert. denied, 406 U.S. 925 (1972) 16, 18, 25

Two Guys from Harrison-Allentown, Inc. v. McGinley,
266 F.2d 427, (3d Cir. 1959),
cert. denied, 362 U.S. 961 (1960) 9

Union National Bank v. Lamb, 337 U.S. 38 (1949) 20

United States v. American-Foreign Steamship Corp.,
363 U.S. 685 (1960) 9, 15

United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996) . 24

United States v. Martinez, 650 F.2d 744 (5th Cir. 1981) .. 18

United States v. Ritte, 558 F.2d 926 (9th Cir. 1977)
(per curiam) 25

United States v. Wilson,
7 F.3d 828 (9th Cir. 1993),
cert. denied, 511 U.S. 1134 (1994) 17

Whitehall Tenants Corp. v. Whitehall Realty Co.,
136 F.3d 230, (2d Cir.), *cert. denied*,
524 U.S. 926 (1998) 8

Williams v. Taylor, 529 U.S. 362 (2000) 27

Woods v. Wright, 334 F.2d 369 (5th Cir. 1964) 14

STATUTES

28 U.S.C. § 46 ..... 2, 4, 6-15

28 U.S.C. § 47 10

28 U.S.C. § 332 ..... 2, 6, 7

28 U.S.C. § 636 ..... 5, 24-26

28 U.S.C. § 1253 15

28 U.S.C. § 1254 ..... 1, 2, 6, 13

28 U.S.C. § 1651 13

28 U.S.C. § 2071 9

28 U.S.C. § 2243 26

28 U.S.C. § 2253 ..... 12, 13, 25

28 U.S.C. § 2254 ..... 17, 18, 24, 28

28 U.S.C. § 2255 ..... 17, 18, 24, 28

28 U.S.C. § 2403 2

Cal. Penal Code § 288 2

Cal. Penal Code § 653f 2

Cal. Penal Code § 664 2

CONSTITUTIONS

U.S. Const., Art. III 8, 10, 15, 24, 25

U.S. Const., Art. III, § 1 7

U.S. Const., Art. III, § 2 18

COURT RULES

4th Cir. R. 22 13

5th Cir. R. 27.2 10

5th Cir. Rule 27.2.3 10

9th Cir. R. 27-1 10

9th Cir. R. 36-2 28

11th Cir. R. 27-1 10

C.D. Cal. R. 3.2.12 26

Cal. R. Ct. 977 28

Fed. R. App. P. 22 ..... 5, 12, 13, 15-19, 21-23, 25

Fed. R. App. P. 24 17

Fed. R. App. P. 27 ..... 5, 10-12, 14, 15

Fed. R. App. P. 47 9

Fed. R. Civ. P. 6 ..... 20, 23

Fed. R. Civ. P. 72 ..... 5, 26

Supreme Court Rule 10 6

Supreme Court Rule 13.3 1

Supreme Court Rule 14.1 ..... 1, 2, 6

Supreme Court Rule 29.4 2

OTHER AUTHORITIES

3d Cir. Int. Op. Proc. 10.5.1 10

7th Cir. Int. Op. Proc. 1 10

8th Cir. Int. Op. Proc. D 10

9th Cir. Gen. Ord. 5.4 8

9th Cir. Gen. Ord. 6.10 ..... 7, 8

9th Cir. Gen. Ord. 6.11 ..... 7, 8

9th Cir. Gen. Ord. 6.2 ..... 8, 16

9th Cir. Gen. Ord. 6.3 ..... 7, 10

Frank Coffin, The Ways of a Judge 174 (1980) 8

PETITION FOR WRIT OF CERTIORARI

Defendant Christopher Alan Morgan respectfully prays that a Writ of Certiorari issue to review the order of the two-judge panel of the U.S. Ninth Circuit Court of Appeals issued on February 21, 2002; and the order of the two-judge Ninth Circuit panel denying a motion for a three-judge panel and denying rehearing, issued on May 21, 2002.

I. CITATIONS TO OPINIONS BELOW (Rule 14.1(d))

Neither order of the two-judge panel of the Ninth Circuit in this case, filed on February 21 and May 21, 2002 (attached as Exhs. A and B, Appendix pp. 2, 4), was reported. The order issued by the District Court denying the application for a COA, entered on August 14, 2001 (Exh. C, App. 6), was also not reported. The opinion of the Magistrate Judge recommending denial of the petition for habeas corpus, entered on June 1, 2001 is reported at 156 F.Supp.2d 1133; as is the order of the District Judge, entered on June 29, 2002, adopting the Magistrate Judge's recommendation. Exh. D, App. 9. The opinion of the California Court of Appeal, Fourth Appellate District, filed on Nov. 30, 1999 and amended on Dec. 23, 1999 (Exh. F, App. 38, 50), is not reported. The March 15, 2000 order of the California Supreme Court denying discretionary review, two Justices dissenting (Exh. G, App. 53), is unofficially reprinted on-line at 2000 Cal. LEXIS 2018.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

The order of the two-judge panel of the Ninth Circuit of which petitioner seeks review, summarily denying a certificate of appealability, was filed and entered on February 21, 2002. App. 2. On May 21, 2002, the two-judge panel of the Ninth Circuit denied a timely petition for rehearing. App. 4.

This petition is filed under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(a).

(Although Question 1 of this petition encompasses an issue of whether a two-judge panel's order denying a COA is an order of a Court of Appeals under 28 U.S.C. § 46(b), this Court still has certiorari jurisdiction. *See* 28 U.S.C. § 1254.)

The notifications required by Rule 14.1(e)(v) are being made concurrent with the filing of this petition, as set forth on the Certificate of Service. *See* III below.

III. STATEMENT RE: 28 U.S.C. § 2403 (Rule 29.4)

28 U.S.C. § 2403(a) may apply, because Question 1 of this petition may also call into question the constitutionality of one or more General Orders of a U.S. Court of Appeals promulgated under an Act of Congress (28 U.S.C. § 332). *See* p. 7, *infra*. No question of the constitutionality of these General Orders has previously been certified to the Attorney General pursuant to 28 U.S.C. § 2403(a).

IV. CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS (Rule 14.1(f))

Relevant provisions are set out in Exh. J, App. 79-84.

V. STATEMENT OF THE CASE (Rule 14.1(g))

A. Background; Procedural History

The information filed on May 6, 1996 charged petitioner with two felony counts, one of solicitation of a lewd act with a 14- or 15-year-old in violation of Cal. Penal Code § 653f(c)/288(c), and one of attempted lewd act with a 14- or 15-year-old in violation of Penal Code § 664/288(c). CT 103. The charges arose out of a 'sting' operation by which a local police officer advertised a fictitious prostitution service, and on receiving phone calls, sought to talk callers into requesting prostitution with fictitious minor females. RT 99-103, 225.

Petitioner's motion to set aside the attempt count in was granted, reducing the case to one solicitation count. CT 191, 370. In a bench trial, petitioner was convicted. CT 393.

At sentencing, the trial court expressly found that petitioner had called seeking an adult prostitute (which he requested three times, CT 489-90) and not a minor, but was dissuaded from an adult by the officer, RT 225; and accepted a psychiatrist's finding that the incident was a one-time event after the breakup of a relationship, and petitioner didn't meet the criteria for a pedophilic disorder, show pronounced pedophilic interest, or present a significant risk for reoffense. CT 432-33. The trial court suspended imposition of sentence, and granted three years probation. RT 225.

Petitioner appealed the judgment to the California Court of Appeal, Fourth Appellate District, Division Three. His conviction was affirmed by opinion on Nov. 30, 1999, and his petition for rehearing was denied, with a modification in the opinion to reject an argument the opinion hadn't addressed. App. 38, 50. His petition for discretionary review in the state Supreme Court was denied on March 15, 2000, with two of seven Justices dissenting. App. 53.

On May 4, 2000, petitioner filed a petition for habeas corpus in the Central District of California. The District Court issued an order to show cause, and referred the case to a Magistrate Judge, on May 8, 2000.

(Petitioner's probation was completed successfully, without any allegation of violation, after he filed his federal petition. However, he was still in "custody" under federal habeas law when his petition was filed, which permitted him to continue the litigation. *Sibron v. New York*, 392 U.S. 40, 55-57 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).)

By opinion entered on June 1, 2001, the Magistrate Judge issued a Report and Recommendation that the petition be denied in full. App. 6 (opinion reported at 156 F.Supp.2d 1133). Petitioner filed objections. The District Judge overruled the objections in full without opinion, and entered judgment, on June 29, 2001. Apps. 9, 36.

On July 30, 2001 (a Monday), petitioner filed a notice of appeal and request for certificate of appealability (COA), with memorandum, as to each of the five petition issues. App. 75 [exhibit does not include the memorandum].)

There was no subsequent order of reference to a Magistrate Judge. On August 2, 2001, the Magistrate Judge wrote an order denying a COA for the reasons in the District Court's opinion, and sent it to the District Judge, who signed it on August 9. (These events are not in the public PACER docket; they are obtained from the face of the order, App. 6-7.)

The COA denial order was filed on August 13, 2002, and entered on the docket on August 14. App. 6. Petitioner filed a further memorandum in support of a COA in the Ninth Circuit, and a separate motion with memorandum to remand the case for lack of jurisdiction in the District Court's COA denial.

On February 21, 2002, a two-judge panel of the Ninth Circuit denied a COA and all pending motions, without opinion or reference to the District Court order. App. 2.

In response to the two-judge panel's order, petitioner filed a document with a motion for three-judge panel, petition for rehearing and suggestion for rehearing en banc. App. 55.

On May 21, 2002, the two-judge panel without opinion denied the motion for a three-judge panel, denied the petition for rehearing, and rejected the suggestion for rehearing en banc on behalf of the entire Court. App. 4.

B. Presentation Of The Federal Claims Below

Question 1 did not arise until the February 21, 2002 order of the two-judge panel of the Ninth Circuit from which certiorari is sought, because: (1) That was the order which first violated 28 U.S.C. § 46(b), if petitioner is correct that 28 U.S.C. § 46(b) applies here as he contends in Question 1, and (2) It was also the first order issued in the Ninth Circuit.

Petitioner raised the federal claim in Question 1, the violation of 28 U.S.C. § 46(b), at the earliest time after it arose, in his March 7, 2002 motion for a three-judge panel and

petition for rehearing in the Ninth Circuit. App. 60-66; *see, e.g., Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) [petitioner not required to anticipate federal claim, and preserved it by raising it immediately after it arose, in rehearing petition in state Supreme Court]; *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366 (1932) [similar for challenge to state Supreme Court ruling, which "petitioner could not make in advance of the event"]; *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) [similar]; Fed. R. App. P. 27(c) [denial of motion by one judge subject to review by the Court].

Questions 2 and 4 did not arise until the District Court's Aug. 14, 2001 order denying a COA, because that federal claim deals with what must be done after a District Court denial of a COA which violates Fed. R. App. P. 22(b) [Question 2], or laws governing District Court jurisdiction such as 28 U.S.C. § 636 or Fed. R. Civ. P. 72 [Question 4].

Petitioner presented the federal claims in Questions 2 and 4 at the earliest time after they arose, in his September 18, 2001 motion for remand in the Ninth Circuit. When the two-judge panel denied the motion without stated reason on February 21, 2002, petitioner renewed the federal claims in Questions 2 and 4 in his petition for rehearing. App. 66-71.

Question 3 did not arise until the February 21, 2002 order of the two-judge panel of the Ninth Circuit from which certiorari is sought. Because the federal claim deals with the lawfully required contents of an order denying a COA by a Court of Appeals or judge(s) thereof, the claim didn't exist until the issuance of an order which violated that law.

Petitioner presented the federal claim in Question 3 at the earliest time after it arose, in his March 7, 2002 petition for rehearing. App. 57; *see* authority re: Question 1, *supra*.

Question 5 deals with the underlying merits of the federal petition for habeas corpus. Petitioner properly raised all of his federal constitutional arguments in the state courts, specifying that they were federal claims and citing specific federal authority for each. *See* Fed. Hab. Petn., Alleg. VI. In the District Court, the State conceded that petitioner exhausted his

state remedies, and alleged no procedural bars. The District Court's opinion addressed the merits of each of his claims and did not mention exhaustion or any procedural bar. Petitioner also raised his federal constitutional claims on the merits in his petition, traverse and memoranda in the District Court, and again in his objection to the Magistrate Judge's recommended ruling, and his memoranda seeking a COA in the Ninth Circuit.

VI. REASONS FOR GRANTING THE WRIT

(Rules 10, 14.1(h))

A. Question 1: Denial Of Three-Judge Panel (28 U.S.C. § 46(b))

1. Applicability Of 28 U.S.C. § 46(b); Contrary Practices Of The Ninth Circuit And Other Courts Of Appeals

Question 1 raises one of the most basic jurisdictional issues in a COA case: What constitutes a "Court of Appeals"?

The question of whether 28 U.S.C. § 46(b) applies to COA applications is of widespread importance for the administration of federal judicial business throughout the Ninth Circuit. The Ninth Circuit is unique among all United States Courts of Appeals in permitting an assigned panel of fewer than three judges to deny a COA, and then deny all requests for a panel of at least three judges. As discussed below, a Ninth Circuit General Order, enacted by its Judicial Council under 28 U.S.C. § 332(d)(1), permits the practice.

In *Hohn v. United States*, 524 U.S. 236 (1998), this Court held that a COA application creates a "case in the Court of Appeals" for purposes of 28 U.S.C. § 1254(1). *See also Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000) [applying *Hohn*]. However, *Hohn*'s analysis applies equally to other federal jurisdictional statutes which use the word "case." "The words 'case' and 'cause' are constantly used as synonyms in statutes...each meaning a proceeding in court, a suit, or action," and a COA

application fits well within that description. *Hohn*, 524 U.S. at 241 [quoting *Blyew v. United States*, 13 Wall. 581, 595 (1871)].

If as *Hohn* held, a COA application is a "case in the Court of Appeals," then denial of a COA application is a "determination of a case in the Court of Appeals"—the plain language of 28 U.S.C. § 46(b). It thus requires three judges.

Certiorari is warranted to determine whether the Ninth Circuit's unique administrative shortcut reduces the number of judges it assigns to these commonplace proceedings, below the number required by Congress.

Question 1 also puts into issue the constitutionality of Ninth Circuit General Order 6.3(g)(1)(i), enacted by the Ninth Circuit's Judicial Council under 28 U.S.C. § 332(d)(1); either by itself, or read in conjunction with Ninth Circuit General Orders 6.10 and 6.11, If General Order 6.3(g)(1)(i) violates 28 U.S.C. § 46(b), then it also violates Article III, § 1 of the Constitution, since only Congress can define the jurisdiction of the lower federal courts. *Federal Power Comm. v. Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939).

Question 1 may also affect the six other Circuits—the Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh—that permit a litigant to obtain three judges only on a petition for rehearing or motion for reconsideration by a three-judge panel, after denial of a COA by a one- or two-judge panel. Although these Circuits do not permit judges to deny a three-judge panel at all times as the Ninth Circuit does, *see* App. 85-86, denial of a COA by an assigned panel of fewer than three judges in the first instance may still violate 28 U.S.C. § 46(b) (and Article III, § 1 of the Constitution) in light of *Hohn*. Although a litigant in these Circuits can obtain three judges with a petition for rehearing or motion for reconsideration, that shouldn't be needed for a litigant to obtain what § 46(b) requires in the first instance.

A table of Local Rules, IOPs, General Orders, and other authority, listing the practices in all the Circuits relevant to how many judges decide COA applications, is supplied in the Appendix as part of Exh. J, App. 85-86. *Cf. Hohn v. United States*,

524 U.S. at 242 [looking to practices of Courts of Appeals in General Orders, Internal Operating Practices, and Local Rules, as part of decision on whether COA application is a "case"].)

But although it affects cases in seven Circuits, Question 1 is presented most directly and starkly in a case from the Ninth, because the Ninth Circuit is unique in permitting two judges to (i) act as a "Court" for denial of a COA, and (ii) bar the COA applicant from obtaining a panel of more than two judges at any time. *See* 9th Cir. Gen. Ords. 6.10 [petition for rehearing or reconsideration of motion is referred to same panel that decided it], 6.11 [panel that decided motion may reject suggestion for rehearing en banc on behalf of entire Court]; *compare* 9th Cir. Gen. Ord. 5.4(a) [which normally requires en banc requests to be sent to every active judge]. (Though two judges is a quorum under 28 U.S.C. § 46(d), that is reserved for unusual circumstances such as recusal or death of a judge after oral argument, and assumes a properly assigned three-judge panel *ab initio*. *E.g.*, *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 232 (2d Cir.), *cert. denied*, 524 U.S. 926 (1998).)

In fact, under internal Ninth Circuit procedure, a two-judge panel doesn't even have to read the applicant's briefing (or anything else) before denying a COA. Rather, "The motions attorneys and designated deputy clerks shall prepare motions [including COA applications] for presentation to a motions panel....Motions shall be presented orally to the motions panel. For some motions [not specified], the moving papers will be sent to the panel in advance of presentation." 9th Cir. Gen. Ord. 6.2(d), 4th par. [emphasis added].

Thus instead of the thoughtful, collegial interchange among jurists that is the tradition of three-judge federal appellate courts, *see, e.g.*, Frank Coffin, The Ways of a Judge 174 (1980), the COA applicant in the Ninth Circuit may get only a non-Article III staff attorney making an oral presentation of some sort to two judges. (The PACER docket even refers to the Feb. 21, 2002 order denying petitioner's Ninth Circuit COA application as an "Order of Staff Attorneys." *See* PACER entry

for March 7, 2002. The denial order, App. 2, has a footer indicating its origin in a research attorney's computer.)

Moreover, no published Ninth Circuit authority is available to tell litigants that due to a now-archaic General Order, the Court is out of compliance with an Act of Congress in denying COA applications. *Compare, e.g.,* 28 U.S.C. § 2071(a) [local rules must be consistent with Acts of Congress]; Fed. R. App. P. 47(a) [same, in Courts of Appeals]; *Stern v. U.S. District Court*, 214 F.3d 4, 21-22 (1st Cir. 2000) [same; local rule also cannot subvert purpose of statute or national rule], *cert. denied*, 531 U.S. 1143 (2001); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F.2d 427, 432 (3d Cir. 1959) [federal jurisdictional statute is paramount over local rule on assignment of cases], *cert. denied*, 362 U.S. 961 (1960).

Such considerations make Question 1 particularly applicable to cases from the Ninth Circuit—especially one like this, where a two-judge panel issued a COA denial with perhaps no more than an oral staff presentation, and then denied a motion for a three-judge panel and a petition for rehearing.

Question 1 is of widespread importance, as it potentially affects every denial of a COA within the Ninth Circuit, which petitioner presumes is hundreds of cases each year (he couldn't locate statistics that specific). It is of even greater magnitude if the other six Circuits which permit original COA denials by an assigned panel of fewer than three judges (Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh) are added. However, the federal question is most substantial out of the Ninth, because that is the only Circuit where a litigant—such as petitioner—can permanently be denied an assigned panel of at least three judges.

The proper application of 28 U.S.C. § 46 in these common situations is appropriate for certiorari as "a question of importance to the Courts of Appeals in the administration of their judicial business." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 687 (1960) [considering different issue of panel composition under 28 U.S.C. § 46, and vacating Court of Appeals opinion as issued by panel that could not act for the Court]. *See also Moody v. Albemarle Paper Co.*, 417

U.S. 622, 624 (1974) (per curiam) [certification accepted on an issue under 28 U.S.C. § 46 because of "importance of the question to the administration of judicial business in the circuits"].)

In an earlier opinion, this Court characterized a similar type of question [involving now-28 U.S.C. § 47] as one "deeply affecting the administration of justice in the circuit court of appeals," and stated that if a Court of Appeals decree was void for this type of reason, then it "should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari." *American Construction Co. v. Jacksonville, T. & K.W. R. Co.*, 148 U.S. 372, 388 (1893).

The Ninth Circuit considers denial of a COA application to be a mere administrative matter rather than a "case." Ninth Circuit General Order 6.3(g)(3)(i) requires that three judges must participate "whenever a motion results in the disposition of a case" (emphasis added). General Order 6.3(g)(1)(i)—and the result here—could not exist if the Ninth Circuit considered a COA denial to be "the disposition of a case." Other Circuits also label a COA application as less than a judicial case. *See* 5th Cir. R. 27.2, 27.2.3 ["procedural motion"]; 8th Cir. Int. Op. Proc. D(3) [COA applications go to "administrative panels"]. The views of these Circuits are contrary to *Hohn*'s holding that serious constitutional questions would surround an arrangement by which "an entity not wielding judicial power might review the decision of an Article III court." 524 U.S. at 245-46.

Question 1 also implicates other provisions of federal law. Fed. R. App. P. 27(c) states: "A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." Some Courts of Appeals have similar provisions in local rules and procedures. *See* 3d Cir. Int. Op. Proc. 10.5.1; 7th Cir. Int. Op. Proc. 1(a)(1); 9th Cir. R. 27-1, Adv. Comm. Note (2); 11th Cir. R. 27-1(d).

Yet as discussed above, seven federal Courts of Appeals—the Fifth through Eleventh, inclusive—permit a panel of fewer than three judges to dismiss or otherwise determine a COA application in the first instance. In the Fifth, Sixth, Tenth and Eleventh Circuits, a single judge can do so.

The Ninth Circuit, as discussed above, goes much farther and permits a 'two-judge panel' to deny a COA in a manner that blocks a litigant from being heard by more than two judges.

If a COA application is an "appeal or other proceeding" under rules such as Rule 27(c), then a denial of a COA by a Court of Appeals, or a judge or judges thereof, constitutes "dismiss[ing] or otherwise determin[ing] an appeal or other proceeding," which requires three judges.

Hohn should be dispositive again: If a denial of a COA terminates a "case in the Court of Appeals," then synonymously, it is also a termination of an "appeal or other proceeding" under Rule 27(c) and related local rules. *Hohn* relied on this provision of Rule 27(c) to support its analysis and conclusion. 524 U.S. at 244-45. In that event, the Ninth Circuit's practice, and presumably that of the other six Circuits discussed above, would violate Rule 27(c) and related local rules, as much as they violate 28 U.S.C. § 46(b).

Congress enacted 28 U.S.C. § 46(b) in 1948 "to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels." *Murray v. Nat'l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). However, the practice Congress sought to curtail over a half century ago is, according to its General Orders, the rule in the Ninth Circuit today.

Certiorari should thus be granted to decide whether the Ninth Circuit's routine use of one fewer judge than required in 28 U.S.C. § 46(b) is a permissible shortcut for administration of court business, or contrary to the plain language of § 46(b) after *Hohn*. A grant would also enable this Court to resolve the related issues raised by COA procedures in six other Circuits.

2. Reconciliation Of This Court's *Hohn* And *Burwell* Opinions: Construing The Relevant Statutes And Rules As An Harmonious Statutory Scheme

Question 1 would also permit this Court to resolve an apparent conflict in the language of its own opinions—its 1998

Hohn opinion, and its opinion in *In re Burwell*, 350 U.S. 521 (1956) (per curiam). Only this Court can determine which of two seemingly conflicting opinions is to prevail. *Hohn*, 524 U.S. at 252-53; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In *Burwell*, the Ninth Circuit asked this Court for the basis of its authority to issue a certificate of probable cause (CPC) after the 1948 enactment of 28 U.S.C. § 2253; whether the opinion later overruled by *Hohn*, *House v. Mayo*, 324 U.S. 42 (1945), was affected by § 2253; and if not, whether a CPC application was for the Court as a whole, a single judge, or multiple judges. This Court held: "It is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." *Burwell*, 350 U.S. at 522.

The 1956 *Burwell* opinion thus seems to say a Court of Appeals has discretion to assign two-judge panels or single judges to consider COA applications. No doubt this is why seven of the twelve Circuits do so in the first instance, and why the Ninth Circuit uses the more extreme resource-saving approach discussed herein. The 1998 *Hohn* opinion, by contrast, holds that denial of a COA application decides a "case" under federal statutes; and 28 U.S.C. § 46(b) requires a Court of Appeals to assign only three-judge panels for the "hearing and determination of cases." *Burwell* did not mention § 46(b).

In determining how to reconcile *Hohn* and *Burwell*, this Court should interpret the relevant statutes and rules—the three-judge requirements of 28 U.S.C § 46(b) and Fed. R. App. P. 27(c), and the language in 28 U.S.C. § 2253 and Fed. R. App. P. 22(b) which discuss consideration of a COA by a single Court of Appeals Judge—"as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000).

Hohn dealt with this Court's jurisdiction over a petition for certiorari from the Eighth Circuit's denial of a COA. This

Court held the COA application created a "case in the Court of Appeals," and thus fell under 28 U.S.C. § 1254(1).

Hohn fits squarely with 28 U.S.C. § 46(b). Section 46(b) states: "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges...." (Emphasis added.) Under *Hohn*, the filing of the COA application or appeal in the Court of Appeals commences a "case" there. And a Court of Appeals' denial of a COA certainly "determines" the case, by terminating it. Section 46(b) requires an assigned three-judge panel for that.

But while *Hohn* held that the original COA application creates a "case," a grant of that application isn't a "determination of a case" within the language of § 46(b). Rather, a COA grant merely permits the previously-filed "case" to continue. The language of 28 U.S.C. § 46(b) is thus inapplicable to a grant of a COA.

Section 2253(c)(1) states that an appeal from the denial of a COA cannot be taken "[u]nless a circuit justice or judge issues a certificate of appealability." (Emphasis added.) Its language is plain: A single judge can grant a COA. No statute or rule says that can't be a Court of Appeals judge; clearly, it can. Similarly, FRAP 22(b) states that a "circuit... judge" may "issue[] a certificate of appealability."

This plain-language construction, by which an assigned three-judge panel is required for denial of a COA but any one judge on the panel can grant it, has long been codified in Fourth Circuit Rule 22(a). The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits also permit a single judge to grant a COA. *See* App. 85-86.

This construction which is the procedure of the Fourth Circuit also yields an harmonious statutory/rule scheme. Jurisdictionally, the grant of a COA may be viewed as merely a grant of interim relief that preserves the jurisdiction of a Court—jurisdiction which originally attached when the "case" was first filed—to ensure the Court may consider an applicant's claim on the merits. Single judges or Justices have long been empowered to issue such orders. 28 U.S.C. § 1651; *Application*

of President and Directors of Georgetown College, 331 F.2d 1000, 1005-06 (D.C. Cir.) (opn. of Wright, J., in chambers), *cert. denied*, 377 U.S. 978 (1964); *see also Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 662 n.4 (1963); *Woods v. Wright*, 334 F.2d 369, 373 (5th Cir. 1964). Procedurally, a grant of a COA is akin to denial of a motion to dismiss an appeal, a procedural order which can be issued by a single Court of Appeals judge. *Pioneer Properties, Inc. v. Martin*, 776 F.2d 888, 890 n.1 (10th Cir. 1985); *Grubbs v. Derwinski*, 2 Vet. App. 78, 79 (1991) (per curiam). By contrast, unlike a grant, a COA denial is a "determination of a case" in light of *Hohn*, and is thus subject to § 46(b)'s three-judge panel requirement.

It is also pragmatically logical for the statutes and rules to permit one judge to grant a COA, but require an assigned three-judge panel to deny it.

Legally, the standard for a COA application in a Court of Appeals is much lower than a decision on the merits. For a COA, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) [adopted for COAs in *Slack v. McDaniel*, 529 U.S. at 483-84].

For purposes of construing the statutes and rules, if one judge on a three-judge panel believes a COA should issue on a federal claim, even if the other two don't, that itself strongly indicates the claim satisfies the COA standard as "debatable among jurists of reason"—at the very least, because the one judge has created a debate among jurists of reason. Perhaps as an abstract matter of policy, that too could be debated among jurists of reason. But this construction isn't abstract policy; it is what the statutes and rules actually say.

Thus the entire statutory/rule scheme may be construed harmoniously: 28 U.S.C. § 46(b) and FRAP 27(c), require a three-judge panel for denial of a COA because that is the

"determination of a case" in light of *Hohn*; while FRAP 22(b) and 28 U.S.C. § 1253(c)(1) provide that a single Court of Appeals judge may grant a COA, which is not subject to 28 U.S.C. § 46(b) or FRAP 27(c) because it merely continues a pre-existing case rather than determining one.

In this case, a two-judge Ninth Circuit panel issued an order denying a COA. That was the determination of a "case" under 28 U.S.C. § 46(b). No law authorizes a federal Court of Appeals to determine a case with only two judges. Such an order is thus void. *United States v. American-Foreign Steamship Corp.*, 363 U.S. at 691; *American Construction Co. v. Jacksonville, T. & K.W. R. Co.*, 148 U.S. at 387-88.

Accordingly, certiorari should be granted, and the orders of the two-judge panel vacated.

B. General Considerations Re: Questions 2, 3 And 4

Questions 2, 3 and 4 follow from Question 1, in part because Questions 2, 3 and 4 are more clearly raised after this Court's *Hohn* opinion holding a COA application creates a case in a Court of Appeals. These are important questions, to the extent they deal with a compression or truncation of the COA process below that required by Congress and the Federal Rules.

The COA process is supposed to be "not a consideration of the merits," but merely "a gatekeeping mechanism that prevents [appellate courts] from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade [them] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000).

However, a gatekeeping mechanism doesn't perform its role if it screens out the minority of potentially meritorious appeals with the majority that aren't, or if neither a higher court nor the public can verify it is working as it should. And since a gatekeeping mechanism isn't merits consideration, and in some courts is far more a product of non-Article III staff

attorneys than other cases, *see, e.g.*, 9th Cir. Gen. Ord. 6.2(d) ["[t]he motions attorneys and designated deputy clerks shall prepare motions [which] shall be presented orally to the motions panel"], availability of the judicial review required by Congress and the Federal Rules is crucial to maintain oversight over the functioning of the gate, and to ensure a COA application is not treated as an early decision on the merits.

Given the very high volume of COA applications the Courts of Appeals face each year, an issue governing COA applications may be one of widespread importance which often ends up buried in unpublished orders. In petitioner's view, Questions 2, 3 and 4 are straightforward, and also have been decided in other contexts. A grant of certiorari on Questions 2, 3 or 4, particularly in conjunction with Question 1, would thus enable this Court to resolve multiple COA issues at the same time through the vehicle of a single case.

C. Question 2(a): Lack Of District Court Statement Of Reasons (Fed. R. App. P. 22(b))

The order of the two-judge panel below conflicts with the Tenth Circuit's opinion in *Herrera v. Payne*, 673 F.2d 307, 308 (10th Cir. 1982), *cert. denied*, 469 U.S. 936 (1984); the Ninth Circuit's opinion in *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977); and the Fifth Circuit's opinion in *Stewart v. Beto*, 454 F.2d 268, 269 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972), in ratifying a District Court order denying a COA which lacked an adequate statement of reasons under FRAP 22(b). (This assumes as foundation that the District Court's order denying a COA here failed to satisfy Rule 22(b), a question which would have to be reached in any case considering the broader legal issue of Question 2(a). That foundational issue is raised as Question 2(b), *infra*.)

There is no specific statute or rule stating what happens if the District Court violates FRAP 22(b) by failing to give a valid statement of reasons. As the Tenth Circuit put it:

> Clearly the rule imposes a responsibility on the district judge to issue a certificate or a statement detailing his reasons for declining to confer one. A similar provision is found in Fed.R.App.P. 24(a) [in forma pauperis status], which requires a written statement of reasons for certifying an appeal is not taken in good faith. What is not clear is the effect of the failure of the district judge to follow the mandate of the rules, probably because rules seldom contemplate what will happen if they are disregarded.

Herrera v. Payne, 673 F.2d at 308 [citations omitted]. Nonetheless, since "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights," *Slack v. McDaniel*, 529 U.S. at 483, the Federal Rules enacted for adjudication of writ petitions play an equally vital role. It would make little sense if they could be disregarded routinely or at will.

Petitioner recognizes that the large volume of § 2254 and 2255 petitions, and the high rate of dismissals, may increase a tendency for some District Courts to take shortcuts. (Petitioner is aware of other cases in the same District Court where this happened as it did in petitioner's case, such as *Sirkin v. Shumsky* (No. CV-01-8249) (order denying COA entered June 13, 2002).) One District Court candidly stated that it had to change its prior practice in order to comply with FRAP 22(b). *Brown v. Booker*, 622 F.Supp. 993, 994 (E.D. Va. 1985). However, that appears to be the only published District Court opinion on the subject, perhaps not unexpected for a type of order that is often summary and unpublished.

In many other areas, courts have held that when a law requires a statement of reasons, failure to provide an adequate one denies the litigant his or her legal right to review, and requires remand. *See, e.g., United States v. Wilson*, 7 F.3d 828, 839 (9th Cir. 1993) [federal sentencing], *cert. denied*, 511 U.S. 1134 (1994); *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) [asylum request]; *Redding v. Fairman*, 717 F.2d 1105,

1114-16 (7th Cir. 1983) [prison disciplinary proceedings], *cert. denied*, 465 U.S. 1025 (1984); *United States v. Martinez*, 650 F.2d 744, 745 (5th Cir. 1981) [parole revocation]; *Connecticut Light & Power Co. v. FERC*, 627 F.2d 467, 470-71 (D.C. Cir. 1980) [rates for transmission of electric energy]; *Dunlop v. Bachowski*, 421 U.S. 560, 571-74 (1975) [labor organization election]; *Christian v. United States*, 404 F.2d 328, 328 (8th Cir. 1968) (per curiam) [in forma pauperis application].

The FRAP 22(b) cases cited above (*Herrera*, *Gardner* and *Stewart*), are thus well within the mainstream of jurisprudence on laws that require a statement of reasons. Appellant asks that certiorari be granted, to hold that this mainstream of jurisprudence includes § 2254 and 2255 cases as well.

This Court could only reach Question 2(a) in an adversarial case with some specific District Court order denying a COA. U.S. Const., Art. III, § 2, cl. 1. Thus in any such case, it would have to consider whether the District Court order presented Question 2(a) as a substantial federal question.

Because Rule 22(b) clearly requires a District Court to provide a statement of reasons for denying a COA, one wouldn't expect a District Court to respond to a COA application with a mere "Application Denied." Rather, the District Court will at least include some standardized or generic language, such as that in this case—"the appeal is not taken in good faith, and petitioner has not made a substantial showing for the reasons in the Magistrate Judge's opinion." App. 7. Question 2(a) is well presented if, as here, the District Court's statement of reasons doesn't go materially beyond that.

In petitioner's view, it is even better presented in a case where the Court of Appeals (or here, a two-judge panel) also didn't give any statement of reasons—especially where, as here, it didn't adopt or refer to anything in the District Court's order either, but merely said "the request for a certificate of appealability is denied." App. 2. For then, the inadequacy of the District Court's statement of reasons is plainly material to the availability of further review.

D. Question 2(b): Inadequacy Of Standardized Or Boilerplate Statements Of Reasons

The order of the two-judge panel of the Ninth Circuit conflicts with the Tenth Circuit's opinion in *Herrera v. Payne*, 673 F.2d 307, and with the Eastern District of Virginia's opinion in *Brown v. Booker*, 622 F.Supp. at 996-97 which follows *Herrera*.

In *Herrera*, the Tenth Circuit held that a standardized reason with no explanation—"the Court finding no substantial issue of law for review as set forth in the memorandum opinion herein"—did not satisfy the statement of reasons requirement of FRAP 22(b). 673 F.2d at 308.

The decision on a COA is merely a preliminary determination of reasonable debatability. Obviously, a much more summary procedure is contemplated than would be used for a hearing on the merits. FRAP 22(b), however, limits how summary the procedure can be. "The decision [on a COA] is left to the sound discretion of the district judge. . . . However, the proper exercise of that discretion cannot be adequately reviewed where no reasons for the determination have been given." *Herrera v. Payne*, 673 F.2d at 308.

"In the interest of insuring that . . . if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial." Fed. R. App. P. 22, Adv. Comm. Note, Subd. (b). That value is defeated when a District Court's decision on a COA application merely says it adheres to its prior opinion, and adds language such as "this appeal is not taken in good faith" that provides tone but no substance.

Courts in other areas have found that when a statute or rule requires a statement of reasons, a boilerplate or standardized order which speaks in mere generalities (*e.g.*, "for the reasons previously stated", "appeal not taken in good faith," etc.) fails to meet the requirements of law, and requires remand.

The Court of Appeals opinions from other areas that petitioner cited *supra*, p. 17, are all examples.

The problem created by an order which has no valid nonstandardized "reasons" becomes even more significant when the order also relies on at least one legally invalid consideration. *Cf. American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 540 n.74 (1981) ["boilerplate" statement was inadequate to support regulation, when the agency had also provided a legally invalid basis].

Here, petitioner could go on with points that he believes show clear errors of the state court and District Court. *See also infra*, p. 28. But for purposes here, he will point out one clearly invalid consideration on the face of the District Court's COA denial, involving a highly material (non-)"issue" which is so obvious that it doesn't require any analysis at all.

The District Court's denial of a COA asserted in passing —but in boldface—that petitioner's notice of appeal from the District Court's judgment was "**untimely**." App. 6. That was plainly wrong, since the notice of appeal specifically states what a computer or paper calendar confirms: The 30th day after the District Court's entry of judgment was a Sunday, so a notice of appeal filed on the next court day after (here, Monday, July 30, 2001) is timely under Fed. R. Civ. P. 6(a). This Court has so held, twice; the later opinion apparently thought the issue so clear it needed only a single paragraph. *Jones & Laughlin Steel Corp. v. Gridiron Steel Co.*, 382 U.S. 32, 32 (1965) (per curiam); *Union National Bank v. Lamb*, 337 U.S. 38, 40-41 (1949). Oddly, the District Court order didn't assign its assertion of "untimeliness" as a reason to deny the COA; it only said the COA was denied for the reasons in its opinion. App. 7. (In a different appeal that really was untimely, a COA application would have to be dismissed for want of jurisdiction rather than denied on the merits.) Still, the "**untimeliness**" assertion was the only thing resembling a specific reason in the District Court's order—and it was patently and obviously wrong. *Accord* Amd. Mem. for COA (9th Cir.), at 1-4.

This clear and inexplicable invalidity in the District Court's order denying a COA, on what would be a highly material "issue" that would terminate an appeal all by itself if it were valid, only underscores the inadequacy of the District Court's generic reasons for denial in this case.

This case is particularly well suited for a grant of certiorari on Question 2. Not only does it have a District Court order denying a COA that lacks any specificity or explanation, it also lacks an opinion or order of the Court of Appeals specific enough to be an arguable cure of deficiencies in the District Court's denial order. The order of the two-judge Court of Appeals panel not only lacked specificity, it didn't refer to, adopt, or even mention any of the contents of the District Court's denial order. All deficiencies in the District Court's order thus remained unabated.

Certiorari should be granted to address the District Court order denying a COA in light of FRAP 22(b).

E. Question 3: Lack Of Court Of Appeals Statement Of Reasons

An order granting certiorari, vacating and remanding is warranted on authority such as *Northcross v. Board of Education*, 412 U.S. 427, 427-28 (1973) (per curiam), where this Court granted certiorari, vacated and remanded because "[t]he Court of Appeals did not...state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching [its] result." *See also, e.g., Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam) [similar, in APA case].

Here, the orders of the two-judge Ninth Circuit panel not only did not state any reasons of their own, they also didn't refer to or incorporate any part of the District Court's orders. And the absence of even minimal reasons in the Court of Appeals is still more pronounced because the District Court's order didn't contain an adequate statement of reasons either.

A GVR order is thus warranted for the same reasons as in cases such as *Northcross*.

Separately, certiorari is also warranted on Issue (3) as an adjunct to this Court's *Hohn* opinion.

As discussed herein, this Court and others have often held a statement of reasons is indispensable for knowledgeable review of a decision below. However, no statute or rule specifically states that a Court of Appeals, or judge or judges thereof, must give any reasons for denying a COA. Perhaps until this Court's 1998 *Hohn* opinion, neither Congress nor this Court (in the Federal Rules) would have seen any need for such a statute or rule, because an application for a COA in a Court of Appeals was not perceived as a judicial case in the Court of Appeals.

Hohn, however, held that a Court of Appeals' denial of a COA is thus a judicial rather than administrative act. 524 U.S. at 245-46. This Court has certiorari jurisdiction over that judicial act. But when this Court is met with an order from a Court of Appeals (or judges thereof) which is so summary that it doesn't even incorporate or mention anything in the District Court's order that was on appeal, this Court has a problem in reviewing that judicial act—no one can know what the reasons below were, and thus it is "not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching [its] result." *Northcross*, 412 U.S. at 427-28.

It doesn't seem logical that in adopting FRAP 22 in 1967, this Court would have thought it important to have the District Court's reasons before it, but not to have the Court of Appeals' reasons before it—had it then known a COA application in the Court of Appeals was a "case in the Court of Appeals." This Court generally exercises its certiorari jurisdiction to review a decision of the Court of Appeals, not a decision of a one-judge District Court. It would naturally want to see the reasoning of the court whose decision is under review.

In this case, the two-judge panel's orders made that impossible. As a result, for example, no one can know whether the two-judge panel used the right legal standard for COAs. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (per curiam)

[reversing Ninth Circuit's order summarily denying CPC, after District Court order which used overly stringent standard]; *Slack v. McDaniel*, 529 U.S. at 483-84 [standards for COA same as for former CPC]. No one can know whether the two-judge panel considered whether the District Court order complied with Rule 22(b). No one can know whether the two-judge panel agreed with the District Court's passing remark that the notice of appeal was untimely, when it was clearly timely under Fed. R. Civ. P. 6(a) and this Court's precedent. *See supra*, p. 20. No one can know what if any consideration was given to petitioner's points that the District Court had no jurisdiction to issue the order it did. *See infra*, pp. 24-26. No one can know what if any consideration the two-judge panel gave points on the merits such as those *infra*, pp. 28-29. And so forth.

No doubt, a Court of Appeals doesn't have to say much if it wishes to deny a COA in a sound exercise of its discretion. The District Court is already required to provide its own statement of reasons under Rule 22(b), and that statement of reasons is "available on any subsequent application," including the one in the Court of Appeals. Fed. R. App. P. 22, Adv. Comm. Note, Subd. (b). It may usually be enough for the Court of Appeals to review the submissions, and conclude that the District Court's statement of reasons is correct and should be affirmed. That would make it "possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching [its] result." *Northcross*, 412 U.S. at 427-28.

But here, there was nothing at all. Recognizing that certiorari, en banc rehearing, or panel rehearing from a COA denial in a Court of Appeals are rare, that shouldn't deprive a litigant of the right to seek them in a meaningful manner. Since denial of a COA in a Court of Appeals is as much a determination of a judicial "case" as a District Court's denial, an adequate statement of reasons is as essential to meaningful review in one as in the other. This case had neither.

F. Question 4: Lack Of Indication That The Two-Judge Panel Meaningfully Considered Petitioner's Claims That The District Court's Order Denying A COA Was Issued Without Jurisdiction

Certiorari should be granted on Question 4(a) because the summary method of adjudicating all questions at the same time used by the two-judge panel in this case—merely saying "All motions and applications are denied," with no more—cannot be reconciled with the requirement of adjudicating jurisdictional issues first, set forth in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

Petitioner cannot know how many summary unpublished orders dispose of jurisdictional challenges in § 2254 or 2255 cases as the two-judge panel did here, with an order that doesn't even mention the existence of any jurisdictional issues, let alone expressly adjudicate them. Petitioner can only assume it isn't unique to this two-judge panel and case. At the least, the extensive involvement of Magistrate Judges in the determination of 28 U.S.C. § 2254 and 2255 proceedings, and the lack of specific direction on how Courts of Appeals should resolve issues of jurisdiction of non-Article III officers in COA cases, indicate this is an issue of widespread importance as well.

A District Court has no jurisdiction to issue an order that violates 28 U.S.C. § 636. *Gomez v. United States*, 490 U.S. 858, 875-76 (1989). When a Magistrate Judge acts without jurisdiction, any resulting order is a nullity and the District Court has no jurisdiction to enter or approve it. *Aldrich v. Bowen*, 130 F.3d 1364, 1365 (9th Cir. 1997) (per curiam); *Giangola v. Walt Disney World Co.*, 753 F.Supp. 148, 152 (D.N.J. 1990). "The power of federal magistrates is strictly circumscribed by statute. The courts...are not at liberty to disregard or modify the statutory prerequisites to a magistrate's jurisdiction." *In re Marriage of Nasca*, 160 F.3d 578, 580 (9th Cir. 1998); *see also United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). These are requirements of Article III, all of which petitioner asserted in his motion to remand in the Court of Appeals.

Thus, if a District Court "final order" is issued in violation of 28 U.S.C. § 636, a Court of Appeals has no jurisdiction to "affirm," as it cannot properly affirm an order which was issued without jurisdiction. *In re Marriage of Nasca*, 160 F.3d at 580; *Harding v. Kurco, Inc.*, 603 F.2d 813, 814 (10th Cir. 1979); *Cason v. Owen*, 578 F.2d 572, 573 (5th Cir. 1978) (per curiam); *United States v. Ritte*, 558 F.2d 926, 927 (9th Cir. 1977) (per curiam). That is equally true in § 2253 contexts. *Jones v. Johnson*, 134 F.3d 309, 311-12 (5th Cir. 1998). It can grant mandamus within its discretion, *Reynaga v. Cammisa*, 971 F.2d 414, 417-18 (9th Cir. 1992), and it should even be able to *grant* a COA (since a litigant's substantive right to two-track COA review, discussed below, isn't impaired if a Court of Appeals grants the COA). But it cannot properly affirm a denial of a COA in a District Court order issued without jurisdiction as contrary to the laws governing Magistrate Judges.

As Congress and this Court enacted them, 28 U.S.C. § 2253(c) is supposed to work in tandem with Fed. R. App. P. 22, so that a COA applicant has a two-stage right—he or she may ask the District Court for a COA, and if that fails, may ask the Court of Appeals for a COA. *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1211 (1997) (over'd in part on other grds., *Lindh v. Murphy*, 521 U.S. 320 (1997)); *Gardner v. Pogue*, 558 F.2d at 550. This is a substantive right vested in COA litigants by law. *Gardner v. Pogue*, 558 F.2d at 550; *Stewart v. Beto*, 454 F.2d at 269. That legal right to seek review at both stages is defeated if an order denying a COA issues under the District Court's process, but the District Court lacks jurisdiction to issue it, and the Court of Appeals doesn't address that lack of jurisdiction.

Here, the District Court's COA denial had many jurisdictional invalidities. Petitioner was entitled to a decision of an Article III judge on his COA application, but he received an order written by a Magistrate and merely stamped by the Article III judge, with no indication of any level of review. That exceeded the Magistrate Judge's authority, *Estate of Conners v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993), *cert. denied*, 510

U.S. 1045 (1994), and also was an invalid abdication of the District Judge's. *Coolidge v. Schooner California*, 637 F.2d 1321, 1327 (9th Cir.), *cert. denied*, 451 U.S. 1020 (1981). Moreover, the Magistrate sent her order directly to the District Judge "off docket" without petitioner being given notice or opportunity to object, which violated 28 U.S.C. § 636 and Fed. R. Civ. P. 72, voiding the order as well. *Hill v. Jenkins*, 603 F.2d 1256, 1258-59 (7th Cir. 1979); *Coolidge v. Schooner California*, 637 F.2d at 1325-26. There was no order referring the COA application to the Magistrate Judge, which also made her participation void. *Reynaga v. Cammisa*, 971 F.2d at 415 n.1; *see also* C.D. Cal. R. 3.2.12. The "off-docket transmission" was also contrary to § 636(b)(1), because that statute doesn't permit sending postjudgment motions to Magistrates. *Massey v. City of Ferndale*, 7 F.3d 506, 510 (6th Cir. 1993); *Estate of Conners v. O'Connor*, 6 F.3d at 658-59; *Columbia Record Productions v. Hot Wax Records, Inc.*, 966 F.2d 515, 516 (9th Cir. 1992). And petitioner also raised the objection that based on *Holiday v. Johnson*, 313 U.S. 342 (1941), a Magistrate Judge can't be involved at all in the COA process because the statute and rule specifically refer to a "District Judge"—with which the Fifth Circuit recently agreed. *Jones v. Johnson*, 134 F.3d at 311-12 & n.5; *see also Payne v. Wingo*, 442 F.2d 1192, 1194 (6th Cir. 1971) [same, under § 2243].)

As Justice (then-Judge) Kennedy wrote:

> The plan [for *de novo* review of nonconsent references] contains at least the potential for district judges to engage in routine and cursory examinations, so that decisions nominally made by district judges will in fact be those of the magistrate. The identity of the officer responsible for the decision may be unclear to the public or to the litigants. Where the responsibility becomes blurred, power may be either abused or too timidly exercised.

Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537, 546 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

When that happened in the District Court with petitioner's COA application, he objected at the Court of Appeals level. But he received only the most cursory order of a two-judge panel (apparently based solely on a staff attorney's oral presentation, *see supra*, p. 8), which didn't even mention that any jurisdictional issues existed, let alone that there were several or that they were all being specifically adjudicated.

Whatever the standard is for jurisdictional issues relating to COA applications in a District Court, the two-judge panel's order was far below it. Certiorari should be granted.

G. Question 5: A COA Should Be Issued To Petitioner

Petitioner requests a COA in this case, as the ultimate relief he can seek at this time. He places that request before this Court, as the petitioner did in *Hohn*. *See* Br. for Petitioner, Part VI, in *Hohn v. United States*, No. 96-8986, 1996 U.S. Briefs LEXIS 8986 (Dec. 29, 1997). *See also Davis v. Jacobs*, 454 U.S. 911, 913-14 (1981) (Stevens, J., respecting denial of certiorari) and *id.* at 918 (Rehnquist, J., dissenting).

Petitioner recognizes that generally, this Court would leave that type of decision to a lower court in the first instance, after disposing of the federal questions of widespread importance for which certiorari was granted. But in the event the Court wishes guidance on the merits issues in this petition, petitioner provides it here.

Petitioner continues to see the constitutional claims in his petition as plainly meritorious. He has gone to great lengths over the years to present them with proper citations and explanation, in every court. Yet as discussed by illustrations below, most of his key supporting points and authorities have never even been mentioned, let alone addressed, by any state or federal court. *Cf. Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) [state court decision was unreasonable under AEDPA, in part because it failed to evaluate totality of evidence, and failed even to mention defense counsel's key argument].

Unlike the vast majority of COA applications, petitioner's is one that has *objective* indicia of merit. In other words, this Court would not have to familiarize itself extensively with petitioner's arguments in order to get a sense of whether a COA may have been warranted.

As examples petitioner has previously raised [except for No. (2)]: (1) Two Justices of the seven-member state Supreme Court considered at least one of petitioner's issues (presumably, his first issue) so substantial to warrant a grant of discretionary review, an unusual event that itself indicates debatability of the issue, *see, e.g.,* PRH/Mot. for 3-Judge Panel, at 13; (2) The District Court published its opinion denying the habeas petition, which is uncommon in District Court (especially § 2254/2255 denials) and is supposed to be based on some novel or unsettled question, *see, e.g.,* 9th Cir. R. 36-2, itself indicating a reasonably debatable issue meeting the criteria for a COA; (3) Petitioner consistently relied on the sole published opinion directly on point to the underlying state-law issue, *People v. Kirk*, 217 Cal.App.3d 1488, 1496-1500 (1990), yet neither the state Court of Appeal's unpublished opinion nor the District Court even mentioned it, *see* Mem. in Supt. of COA (9th Cir.), at 6-11; PRH, at 13; (4) For his COA application, in response to the District Court opinion, petitioner found six more California published opinions—and a published Ninth Circuit opinion recognizing their legal point—which interpreted a similar statute as creating the same result as in (3) above; but, no court mentioned them either, *see, e.g.,* PRH at 12-13; (5) The Court of Appeal's unpublished opinion cannot be cited or relied on as authority under California law, Cal. R. Ct. 977(a), and thus cannot prevail over a published opinion in federal court, *see* Amd. Mem. in Supt. of COA (9th Cir.), at 7-8 n.2.

As further examples: (5) The state Court of Appeal affirmed on a theory that because the state Legislature intended to broaden the criminal law it should be deemed to have done so as much as possible, but cited no statutory language or case-law to support such a sweeping theory. *See* Mem. in Supt. of COA (Dist. Ct.), at 14-15. (6) The state Court of Appeal's opin-

ion would mean the California Legislature enacted a statutory scheme where a solicitation offense is punished more severely than the completed version of the same offense, which makes no sense and is of doubtful constitutionality. *See id.* at 23-24. (7) Petitioner's second issue was based on the constitutional tenet that no one can be convicted of a crime different from that in the accusatory pleading, while the state Court of Appeal and District Court relied on a theory that a defendant must demur to an accusatory pleading on the ground that "the prosecution charged the wrong victim," a demurrer nowhere recognized in Anglo-American jurisprudence. *See id.* at 13-18. (8) Petitioner's third argument was based on the laws of his own jurisdiction (California), while the District Court relied on a much different law of a different jurisdiction (federal). *See id.* at 18-19. (9) The state Court of Appeal's recitation of the case, and the District Court's adoption of it, were contrary to the strict California law that appellate courts must follow the express and implied factual findings of the trial court, as they contravened the state trial court's factual findings at petitioner's sentencing, and their opinions were written as if those trial court findings didn't exist. *See id.* at 7 n.3. And so forth.

Any one of these factors (among many others in this case) should indicate that petitioner has raised federal questions that are debatable at the very least. This also underscores a problem raised in Questions 2 and 3—no federal court has ever given a reason for denying a COA that even arguably refers to the standard governing COAs.

Petitioner believes he filed a plainly meritorious petition. At the least, for purposes of this petition, it is enough to say there are numerous objective indicia that petitioner's application raised substantial federal questions in a substantial federal case. It deserved at least the minimum treatment plainly required by the statutes, rules, and governing caselaw.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 19th day of August, 2002.

Respectfully submitted,

Michael B. Dashjian (Counsel of Record)
P.O. Box 3650
Paso Robles CA 93447-3650
(805) 239-4511
Counsel for the Petitioner

APPENDIX

Exhibit A

Order of the Two-Judge Panel of the U.S. Ninth Circuit Court of Appeals, Denying Certificate of Appealability (Feb. 21, 2002)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: FEB 21 2002

CHRISTOPHER F. MORGAN,
Petitioner - Appellant,

v.

RON DE LA RIVA,
Respondent - Appellee.

No. 01-56396

D.C. No. CV-00-00434-AHS
Central California (Santa Ana)

ORDER

Before: NELSON, T.G., and TALLMAN, Circuit Judges

All documents received in this case are deemed filed.

Having considered all of petitioner's submissions, the request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2)

All other outstanding motions are denied.

S:\RESEARCH\COA's\Orders\GJ\01-56396.wpd

Exhibit B

Order of the Two-Judge Panel of the U.S. Ninth Circuit Court of Appeals, Denying Motion for Three-Judge Panel and Petition for Rehearing, and Rejecting Suggestion for Rehearing En Banc (May 21, 2002)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: MAY 21 2002

CHRISTOPHER F. MORGAN,
Petitioner - Appellant,

v.

RON DE LA RIVA, Probation Officer, et al.,
Respondents - Appellees.

No. 01-56396

DC # CV-00-434-AHS
Central California (Santa Ana)

ORDER

Before: NELSON, T.G., and TALLMAN, Circuit Judges

Petitioner's petition for rehearing is denied. *See* 9th Cir. R. 27-10. Petitioner's suggestion for rehearing en banc is rejected by the panel on behalf of the court. *See* Gen. Ord. § 6.11.

No further filings shall be accepted in this closed docket.

Exhibit C

**Order Issued By U.S. District Court,
Central District of California,
Denying Certificate of Appealability
(Entered Aug. 14, 2001)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED AUG 13 2001
ENTERED ON ICMS 8/14/01

CHRISTOPHER MORGAN, aka
CHRISTOPHER ALAN MORGAN,
Petitioner,
vs.
JOHN ROBINSON, Chief Probation Officer,
Orange County Department of Probation, et. al.,
Respondents.
Case No. SACV 00-0434-AHS (RC)

ORDER DENYING CERTIFICATE OF APPEALABILITY

On July 30, 2001, petitioner Christopher Morgan, aka Christopher Alan Morgan, through his attorney, **untimely** filed a Notice of Appeal to the Ninth Circuit and Request for Certificate of Appealability, with supporting memorandum, following denial of his Petition for Writ of Habeas Corpus. On June 27, 2001, the Court adopted the Magistrate Judge's Report and Recommendation denying the petition and dismissing the action, and Judgment was entered on June 29, 2001.

DISCUSSION

The petitioner filed his habeas corpus petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), challenging his conviction on the following grounds:

Grounds One and Two -- The petitioner's due process rights were violated when he was convicted of a "nonexistent" crime, which was subsequently "created [by the California Court of Appeal] . . . and applied . . .

retroactively to petitioner";

Grounds Three and Four -- There was insufficient evidence to support petitioner's conviction because the accusatorial pleading charged him with soliciting a fictitious person, or in the alternative, the accusatory pleading was changed in violation of his due process rights;

Ground Five -- The petitioner's due process rights were violated because he was entrapped; and

Ground Six -- The California Court of Appeal's "overall treatment of petitioner's appeal was arbitrary."

This Court finds that the appeal is not taken in good faith, and that petitioner has not made a substantial showing that he has been denied a constitutional right, for the reasons set forth in the Report and Recommendation of the United States Magistrate Judge, and accordingly, a certificate of appealability should not issue under 28 U.S.C. § 2253(c) (2) and Fed. R. App. P. 22(b). Slack v. McDaniel, 529 U.S. 473, 483, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000); Mayfield v. Calderon, 229 F.3d 895, 900 (9th Cir. 2000).

ORDER

IT IS ORDERED that a Certificate of Appealability be DENIED.
DATED: AUG - 9 2001

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

DATE: August 2, 2001

PRESENTED BY ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

docs\case000\00-0434.2
8/2/01

Exhibit D

Opinion Of Magistrate Judge Recommending Denial Of Petition For Habeas Corpus (Entered June 1, 2001), With District Judge's Order Approving And Adopting Magistrate Judge's Recommendation (Entered June 29, 2001) (Both Reported At 156 F.Supp.2d 1133)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED JUN 28 2001
ENTERED JUN 29 2001
ENTERED ON ICMS JUN 29 2001

CHRISTOPHER MORGAN, aka
CHRISTOPHER ALAN MORGAN,
Petitioner,

vs.

JOHN ROBINSON, Chief Probation Officer,
Orange County Department of Probation, et. al.,
Respondents.

Case No. SACV 00-0434-AHS (RC)

ORDER ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES
MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition and other papers along with the attached Report and Recommendation of United States Magistrate Judge Rosalyn M. Chapman, as well as petitioner's objections, and has made a de novo determination.

IT IS ORDERED that (1) the Report and Recommendation is approved and adopted; (2) the Report and Recommendation is adopted as the findings of fact and conclusions of law herein; and (3) Judgment shall be entered denying the petition for writ of habeas corpus and dismissing

the action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and Judgment by the United State mail on the parties.

DATED: June 27, 2001

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

R&Rs\00-0434.ado
6/15/01

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER MORGAN, aka CHRISTOPHER ALAN MORGAN,
Petitioner,

vs.

JOHN ROBINSON, Chief Probation Officer,
Orange County Department of Probation, et al.,
Respondent.

Case No. SACV 00-0434-AHS (RC)

156 F. Supp. 2d 1133; 2001 U.S. Dist. LEXIS 24241

May 25, 2001, Decided
May 25, 2001, Filed; June 1, 2001, Entered on ICMS

SUBSEQUENT HISTORY: Approved, adopted, habeas corpus denied, petition dismissed, Morgan v. Robinson, 156 F. Supp. 2d 1133, 2001 U.S. Dist. LEXIS 24240 (C.D. Cal. 2001).

COUNSEL: For CHRISTOPHER F MORGAN, petitioner: Michael B Dashjian, Michael B Dashjian Law Offices, Paso Robles, CA.

For RON DE LA RIVA, JOHN ROBINSON, WILLIAM DANIEL, ORANGE COUNTY PROBATION, DEPARTMENT, BILL LOCKYER, CAL TERHUNE, THE STATE OF CALIFORNIA, respondents: Matthew C Mulford, CAAG Office of Attorney, General of California, San Diego, CA.

JUDGES: ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: ROSALYN M. CHAPMAN

OPINION:

REPORT AND RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Alicemarie H. Stotler, United States District Judge, by Magistrate Judge Rosalyn M. Chapman, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

I

On August 15, 1997, in the Superior Court for the County of Orange, petitioner Christopher Morgan, aka Christopher Alan Morgan, was convicted by a judge of soliciting lewd and lascivious conduct with a 14 year old in violation of California Penal Code ("P.C.") § 653f(c)/288(c) (count 2). Clerk's Transcript ("CT") 103, 393; Reporter's Transcript ("RT") 218. The petitioner was sentenced to three years of formal probation with the condition that he serve six months in the county jail, which could be served by electronic monitoring. CT 472; RT 225-26.

The petitioner appealed his conviction to the California Court of Appeal, which affirmed the judgment in an unpublished opinion filed November 30, 1999, as modified December 23, 1999. Lodgments 5 and 7. On January 13, 2000, petitioner filed a petition for review in the California Supreme Court, which denied the petition on

March 15, 2000; however, Justices Mosk and Kennard were of the opinion the petition should be granted. Lodgments 2 and 4.

II

The California Court of Appeal, in affirming petitioner's conviction, made the following findings of fact: Throughout 1994 and 1995, officers in the vice division of the Huntington Beach Police Department placed a number of advertisements offering escort services in the business personals section of the Orange County Register. The ads were designed to assist the police in learning how escort services operate and to facilitate the investigation and apprehension of persons involved in sex crimes.

One of the ads offered "SCHOOLGIRL ESCORTS" and specified "Hotels OK 18+." On the afternoon of July 22, 1995, petitioner, a 57-year-old attorney, called the telephone number listed in the ad and left his name and number. Posing as an escort service operator, Detective Tim Chambers called petitioner back about an hour later and asked what he was looking for. The petitioner said he liked slender, young women, around 18 or 19, with medium-sized breasts. He also expressed a preference for "shaved pussy."

Chambers said he specialized in young women and advised petitioner to contact another agency if he wanted an adult escort. Wanting to hear more about Chambers' agency, petitioner asked how old his girls were. Chambers replied, "Well, the best way I can answer that is that we find out as much as we can about what your particular needs are and we let you know if we'll be able to provide the service that you're seeking."

When petitioner said he liked young girls, Chambers asked him for an approximate age range. The petitioner coyly answered, "Well, you tell me what you've got and I'll tell you." Chambers rejoined, "I'm pretty sure we don't have anyone as old as 18, but []if that's what you're interested in,

any of the other ads can get you that, and that's what I'd suggest if that's what you want. If you want to go younger, we can. If you want to go quite a bit younger, we can probably arrange that, as well."

The petitioner replied, "Yeah, yeah. Well, you know, 14 is fine with me." Chambers said he had a girl named Kimberly that age and would page her to see if she was available for that evening. He then asked petitioner whether he was expecting a mere dancer or a "full service" escort. Petitioner said he wanted the latter. He also admitted, "I really like young women[] but I've never talked to a service that would provide young women." He asked Chambers if he was a cop, and Chambers laughed and said no.

Chambers then inquired what petitioner wanted to do with Kimberly, which prompted petitioner again to ask if he was a cop. Chambers again said no, explaining he was simply trying to find out petitioner's specific interests. The petitioner stated, "I'm very straightforward. I'm not into pain or humiliation, or anything." Chambers responded, "That's what I meant. We're talking about just a straight sex type call." The petitioner confirmed that was what he had in mind.

Asked by Chambers if he had any other special requests, petitioner said he liked short skirts and that "a schoolgirl's spirit would be nice!" Chambers retorted, "You're a man after my own heart. Got that Catholic schoolgirl fantasy. That one drives me crazy." After that, petitioner said he would be willing to pay $ 350 to have Kimberly come to his house. Chambers told petitioner he would page Kimberly and get back to him.

Forty-five minutes later, Chambers phoned petitioner and told him Kimberly was available. He then described Kimberly for petitioner, which led to the following exchange:

Petitioner: Look, I gotta be honest with you.

Chambers: Um hum . . .

Petitioner: Ah . . . when something is too good to be true it . . . it usually is, you know.

Chambers: Um hum. . . .

Petitioner: This . . . um . . . you know, fantasy of mine, never followed through with it. You know, lots of trouble with 14 year olds as you know. Um . . . .

Chambers: You're telling me! Believe me that's all we . . . that's on our mind every minute, but . . .

Petitioner: Yeah . . .

Chambers: But there's also a lot less competition in the market and a lot more money to be made so . . .

Petitioner: Yeah . . .

Chambers: You go where the money is and you just try to take your precautions.

Petitioner: I'll tell you what, we'll take it step-by-step here.

At that point, petitioner told Chambers to have Kimberly give him a call. When Chambers refused, petitioner said, "Okay, well then there's no way I'm gonna do it." However, petitioner changed his mind after Chambers told him it was not feasible for customers to talk to the escorts ahead of time.

Chambers then told petitioner that Kimberly would meet him at a Carl's Jr. restaurant in Fountain Valley and that he could then take her back to his house. The petitioner told Chambers what kind of car he had and said he would be at the restaurant around 8 p.m.

Chambers went to the restaurant. At 7:53 p.m., petitioner pulled into the parking lot, stepped inside the restaurant momentarily and returned to his car. He then phoned Chambers and left a message that Kimberly was not there. Next, petitioner walked to the front of the restaurant

and looked around before returning to his car and leaving. He left two more messages with Chambers that evening. In the second one he said, "Kimberly was not at Carl's Jr., but I'm still very interested, and I'm willing to give you the benefit of the doubt as to whatever might have happened. Why don't you give me a call[.]"

Five days later, Chambers executed a search warrant at petitioner's residence. He found the newspaper ad for his phony escort service, as well as two short stories about minors having sex with adults. A computer image drawing of a young female and a brochure for ordering nude photographs of children were also found at petitioner's house.[1]

III

On May 4, 2000, petitioner, through his attorney, filed the pending petition for writ of habeas corpus. On June 29, 2000, the respondent answered the petition. On August 7, 2000, petitioner filed a traverse and on April 12, 2001, he filed a supplemental traverse. The following claims are raised in the petition:

Grounds One and Two--The petitioner's due process rights were violated when he was convicted of a "nonexistent" crime, which was subsequently "created [by the California Court of Appeal] . . . and applied . . . retroactively to petitioner" (Petition at 6; Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus ("Memo") at 2-10);

Grounds Three and Four--There was insufficient evidence to support petitioner's conviction because the accusatorial pleading charged him with soliciting a fictitious person, or in the alternative, the accusatorial pleading was changed in violation of his due process rights (Petition at 7; Memo at 12-17);

Ground Five--The petitioner's due process rights were

---

[1] Lodgment 1.

violated because he was entrapped (Petition at 7; Memo at 17-23); and

Ground Six--The California Court of Appeal's "overall treatment of petitioner's appeal was arbitrary" (Petition at 7; Memo at 23-24).

DISCUSSION

IV

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, worked substantial changes to the law of habeas corpus. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), cert. denied, 521 U.S. 1111, 138 L. Ed. 2d 1003, 117 S. Ct. 2497 (1997). Of specific importance to the petitioner's claims are the revisions made to 28 U.S.C. § 2254 (d), which now provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- [P] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [P] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The United States Supreme Court has clarified the meanings of the key clauses in Section 2254(d):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a

> set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identified the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies the principle to the facts of the [petitioner's] case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000); see also Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.) ("An 'unreasonable application' of clearly established federal law [occurs] when [this Court's] independent review of the legal question does not merely allow [it] ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves [the Court] with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct, and the other, the application of the federal law that the [state] court adopted, was erroneous--in other words that clear error occurred."), cert. denied, 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 274 (2000).

Further, under the AEDPA, a federal court shall presume that a determination of factual issues made by a state court is correct, and petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Since the claims raised in the instant petition were raised before the California Supreme Court, this Court must examine the California Supreme Court's decision, which is presumed to be on the merits even though it is without citation to authority or accompanied by a written opinion. Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887, 126 L. Ed. 2d 194, 114 S. Ct. 240 (1993). However, "where there has been one reasoned state judgment rejecting a federal claim, [federal courts are to presume] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst

v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991). Thus, in addressing petitioner's claims to determine whether the California Supreme Court's decision is contrary to, or an unreasonable application of, federal law, this Court will consider the reasoning of the Court of Appeal, which issued a written decision.

V

A state cannot, consistent with due process, convict a defendant of conduct that its criminal laws, as properly interpreted, do not prohibit. Fiore v. White, 531 U.S. 225, 121 S. Ct. 712, 714, 148 L. Ed. 2d 629 (2001) (per curiam); see also Schad v. Arizona, 501 U.S. 624, 633, 111 S. Ct. 2491, 2497, 115 L. Ed. 2d 555 (1991) (plurality opinion) ("It is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, that no person may be punished criminally save upon proof of some specific illegal conduct." (citations and internal quotation marks omitted)). In Fiore, the petitioner was convicted of violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. Fiore, 531 U.S. 225 at 226, 121 S. Ct. at 713. After Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the statute for the first time and held that Fiore's conduct was not within the statute's scope. Id. As a result, the Supreme Court concluded that Fiore's conviction and continued incarceration violated the due process clause. 531 U.S. at 228, 121 S. Ct. at 714.

Here, the petitioner was convicted of soliciting another to commit a lewd act on a 14-year-old child in violation of P.C. § 653f(c), which, when petitioner was arrested, provided:

> Every person who, with the intent that the crime be committed, solicits another to commit rape by force or violence, sodomy by force or violence, oral

copulation by force or violence, or any violation of [P.C.] Section 264.1 [commission of specified sex offenses while acting in concert], [P.C. §] 288 [lewd act on a child] [2], or [P.C. §] 289 [rape by foreign object], shall be punished by imprisonment in the state prison for two, three, or four years.

P.C. § 653f(c) (West 1995) (footnote added).

The petitioner contends that, properly interpreted, P.C. § 653f(c) does not prohibit solicitation of a lewd act upon a 14-year-old child. However, unlike Fiore, the California Court of Appeal has ruled that petitioner was convicted of a valid criminal offense--violation of P.C. § 653f(c)/288(c). Lodgment No. 7 at 5-8. Specifically, the California Court of Appeal held:

[P.C.] Section 653f(c) was enacted in 1979. At that time, [P.C.] section 288[a] prohibited lewd conduct

---

[2] At the time of petitioner's arrest, P.C. § 288(a) provided:
Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

P.C. § 288(a) (West 1995). P.C. § 288(c) provided:

Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and the defendant is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. P.C. § 288(c) (West 1995).

with a child under the age of 14. However, it did not prohibit lewd conduct with a 14 year old, the offense solicited in this case. That prohibition was added in 1988 and is set forth in [P.C.] section 288, subdivision (c) . . . .

* * *

There is little question as to the underlying purpose of [P.C.] section 653f(c). That provision was enacted as part of Statutes 1979, chapter 944. Heralded as "the most significant piece of legislation concerning sex crimes" of the 1970's, chapter 944 brought "sweeping changes in California law governing sex crimes." As reflected in [P.C.] section 653f(c), chapter 944 added new sex offenses to the list of crimes covered by the solicitation statute and increased the penalty for the solicitation of certain sex offenses. Chapter 944 also limited the availability of probation and increased penalties for a variety of sex offenses and made it easier for juvenile sex offenders to be sentenced to state prison. These measures were designed to strengthen the laws regarding child molestation and establish a legislative policy of "dealing more strongly with persons convicted of [sex] crimes."

* * *

The Legislature has broad authority to decide just what types of conduct are illegal and what penalties should attach to criminal behavior; we are not at liberty to judge the wisdom of these decisions. Despite any perceived inconsistencies in the statutory scheme governing sex offenses, one thing is evident: The Legislature clearly intended to broaden the reach of that scheme by enacting [P.C.] section 653f(c). Criminalizing the solicitation of lewd conduct with a 14 year old is entirely consistent with this intent. [P] This result also comports with the plain meaning of the statutory scheme as it existed when this case arose

> in 1995. At that time, [P.C.] section 653f(c) prohibited the solicitation of any violation of [P.C.] section] 288, and subdivision (c) of [P.C.] section 288 prohibited lewd conduct with a 14 year old. Anyone reading these two statutes would know that solicitation of lewd conduct with a 14 year old was illegal. [P] Consistent with both the underlying intent and plain meaning of [P.C.] section 653f(c), . . . the Legislature has prohibited the solicitation of lewd conduct with a 14 year old. Therefore, [petitioner] was convicted of a valid criminal offense.

Lodgment No. 7 at 5-8 (citations and footnotes omitted; emphasis in original).

"State courts are the ultimate expositors of state law," Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886, 44 L. Ed. 2d 508 (1975); Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994), and a federal court is "bound by a state court's construction of its own penal statutes[,] . . . [and] must defer to the construction . . . unless . . . [the] interpretation is 'untenable or amounts to a subterfuge to avoid federal review of a constitutional violation.'" Aponte v. Gomez, 993 F.2d 705, 707 (9th Cir. 1993) (quoting Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), cert. denied, 493 U.S. 942, 107 L. Ed. 2d 332, 110 S. Ct. 344 (1989)); Mullaney, 421 U.S. at 691 n.11, 95 S. Ct. 1886 at n.11; Brodheim v. Rowland, 993 F.2d 716, 717 (9th Cir. 1993).

The petitioner contends the California Court of Appeal's interpretation of P.C. § 653f(c) is untenable because, when P.C. § 653f(c) was enacted in 1979, P.C. § 288 criminalized only lewd or lascivious acts performed on a child under the age of 14, but not lewd or lascivious acts performed on a 14-year-old child.[3] Therefore, petitioner

---

[3] P.C. § 288(c) was added in 1988 to include lewd and lascivious acts performed against a 14- or 15-year-old child. Stats. 1988, ch. 1398, § 1 (1988).

argues, when the California Legislature enacted P.C. § 653f(c), and made it applicable to "any violation" of P.C. § 288, it did not incorporate the prohibition against lewd and lascivious acts performed on 14 or 15 year old children, which was not enacted until nine years later. To support his contention, the petitioner cites Palermo v. Stockton Theaters, Inc., 32 Cal. 2d 53, 195 P. 2d 1 (1948), in which the California Supreme Court stated:

> It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form [in] which they exist at the time of the reference and not as subsequently modified, . . . in the absence of a clearly expressed intention to the contrary.
>
> * * *
>
> There is a cognate rule . . . to the effect that where the reference is general instead of specific, such as reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time. . . .

32 Cal. 2d at 58-59.[4]

The petitioner argues that P.C. § 653f(c) is a specific

---

[4] "A statute of specific reference . . . refers specifically to a particular statute by its title or section number," Norman J. Singer, Statutes and Statutory Construction, § 51.07, p. 269 (6th ed. 2000); whereas, "[a] general reference statute refers to the law on the subject generally." Id. However, "a facially specific legislative reference may, in fact, constitute a general legislative reference." Director, Office of Workers' Compensation Programs v. Peabody Coal Co., 554 F.2d 310, 323 (7th Cir. 1977).

reference statute, rather than a general reference statute. Unfortunately for petitioner, the California Court of Appeal implicitly found to the contrary. Lodgment No. 7 at 5-8. Nor was this conclusion untenable. In fact, P.C. § 653f(c) has characteristics of both specific and general reference statutes since it cites both specific sections of the Penal Code and more generally refers to the broad offenses of "rape by force or violence, sodomy by force or violence, [and] oral copulation by force or violence." Cf. People v. Frawley, 82 Cal. App. 4th 784, 794, 98 Cal. Rptr. 2d 555 (2000)-(noting "it is at least arguable that the reference in [P.C.] section 1203.4 to [P.C.] section 12021 was not a specific adoption of the latter's terms but rather a reference to a system or body of law affecting possession of firearms by ex-felons").

In any event, the California courts have held that "the Palermo rule is not to be applied in a vacuum." People v. Pecci, 72 Cal. App. 4th 1500, 1505, 86 Cal. Rptr. 2d 43 (1999); Frawley, 82 Cal. App. 4th at 794. Rather, "where the words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, 'the determining factor will be . . . legislative intent. . . .'" In re Jovan B., 6 Cal. 4th 801, 816, 25 Cal. Rptr. 2d 428, 435, 863 P. 2d 673 (1993) (citation omitted); Pecci, 72 Cal. App. 4th at 1505. Moreover, "penal statutes . . . are to be construed according to the fair import of their terms, with a view to effect [the statutes'] objects and to promote justice." Cal. Pen. C. § 4; see also People v. Griffini, 65 Cal. App. 4th 581, 588, 76 Cal. Rptr. 2d 590 (1998) (holding penal statutes should be given a reasonable and common sense construction); People v. Mora, 51 Cal. App. 4th 1349, 1355, 59 Cal. Rptr. 2d 801 (1996) (Penal statutes are "read . . . in light of the evils prompting [their] enactment and the objective[s] sought to be achieved by [them].").

As the ultimate arbiter of the California statutes, the California Supreme Court adopted the California Court of Appeal's determination that, in enacting P.C. § 653f(c), the

California Legislature intended to incorporate subsequent amendments to P.C. § 288. Nunnemaker, 501 U.S. at 803, 111 S. Ct. at 2594. The petitioner has not demonstrated that this holding "is 'untenable or amounts to a subterfuge to avoid federal review of a constitutional violation,'" as he must. Aponte, 993 F.2d at 707; Taylor v. Kincheloe, 920 F.2d 599, 609 (9th Cir. 1990). To the contrary, society has a particular interest in protecting its children from molesters, People v. Acuna, 77 Cal. App. 4th 1056, 1061, 92 Cal. Rptr. 2d 224 (2000), and P.C. § 653f(c) was enacted to provide further protection for children against sexual assault. See Review of Selected 1979 California Legislation, 11 Pac. L. J. 259, 438 (1980) (P.C. § 653f(c) was enacted as part of "sweeping changes in California law governing sex crimes," and such changes "illustrate an apparent effort by the legislature to establish a policy of dealing more strongly with persons convicted of these crimes."). Similarly, P.C. § 288(c) was enacted to protect 14- and 15-year-old children to the same extent as children under 14 had previously been protected under the law:

> We see in [the] statutory background [of P.C. § 288(c)(1)] a legislative desire to protect 14- and 15-year-olds from predatory older adults to the same extent children under 14 are protected by subdivision (a) of [P.C.] section 288. . . . Both subdivisions (a) and (c)(1) of [P.C.] section 288 are directed at protecting infants, children and those in their early teens from sexual exploitation by adults.

People v. Paz, 80 Cal. App. 4th 293, 297, 95 Cal. Rptr. 2d 166 (2000). Thus, there is no merit to petitioner's claim that he has been convicted of a non-existent crime in violation of due process.

Nor can petitioner successfully argue that he did not

receive fair warning that his conduct was illegal.[5] Although a deprivation of the right of fair warning can result from "vague statutory language," from an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," or from "a judicial construction of a criminal statute that is unexpected and indefensible," Bouie, 378 U.S. at 352, 354, 84 S. Ct. at 1702-1703; Rogers, 532 U.S. 451 at 457, 121 S. Ct. 1693 at 1698, 149 L.E. 2d 697 at 705, a reasonable person of ordinary intelligence would not find it "unexpected" or "outlandish" that the solicitation of lewd conduct with a 14 year old girl would be illegal. Therefore, there also is no merit to petitioner's claim that he was not given fair warning that his conduct was unlawful in violation of due process.

Accordingly, the state courts' denial of petitioner's claims was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

VI

The Sixth Amendment guarantees a defendant the right to be clearly informed of the nature and cause of the charges in order to allow adequate preparation of a defense. Calderon v. Prunty, 59 F.3d 1005, 1008 (9th Cir. 1995); Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986). The Constitution is satisfied if the information states "the elements of an offense charged with sufficient clarity to apprise a defendant of what to defend against." Russell v.

---

[5] "The fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed." Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243, 244, 46 L. Ed. 2d 185 (1975) (per curiam) (quotation marks omitted); Rogers v. Tennessee, 532 U.S. 451 at 455, 149 L. Ed. 2d 697 at 704, 121 S. Ct. 1693 at 1697 (U.S.); Bouie v. City of Columbia, 378 U.S. 347, 350-51, 84 S. Ct. 1697, 1701, 12 L. Ed. 2d 894 (1964).

United States, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-47, 8 L. Ed. 2d 240 (1962); Miller v. Stagner, 757 F.2d 988, 994 (9th Cir. 1985), cert. denied, 475 U.S. 1048, 89 L. Ed. 2d 577, 106 S. Ct. 1269(1986). However, adequate notice may be provided to a defendant by means other than the charging document. See e.g., Calderon, 59 F.3d at 1010 (defendant received adequate notice during prosecutor's opening statement and at trial); Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992) (defendant received adequate notice during course of trial), cert. denied, 508 U.S. 920, 124 L. Ed. 2d 273, 113 S. Ct. 2367 (1993); Nevius v. Sumner, 852 F.2d 463, 471 (9th Cir. 1988) (adequate notice provided because the indictment referred to the state statutes that defined the crime), cert. denied, 490 U.S. 1059, 104 L. Ed. 2d 441, 109 S. Ct. 1972 (1989).

In Grounds Three and Four, petitioner contends there was insufficient evidence to support his conviction because the accusatorial pleading charged him with soliciting a fictitious person, or, in the alternative, the accusatorial pleading was changed in violation of his due process rights. Petition at 7; Memo at 13-17. Both of these claims are without merit.

The California Court of Appeal, in denying these claims, found:

> [Petitioner] was charged with violating [P.C.] section 653f(c) by soliciting "JANE DOE (i.e., Kimberly) to commit and join in the commission of SEXUAL INTERCOURSE, in violation of [P.C.] Section 288(c) . . . ." However, as [petitioner] notes, [P.C.] section 653f(c) requires the solicitation of another person. Because Kimberly was not a real person, [petitioner] contends his conviction must be reversed. [P] [Petitioner] technically may have been charged with soliciting Kimberly, but he clearly knew he was being tried for soliciting Chambers to arrange an

> illicit encounter with Kimberly. The evidence at both the preliminary examination and trial centered on [petitioner's] contacts with Chambers. And, the parties and the court proceeded on the assumption that the critical issue in the case was whether [petitioner] solicited Chambers to commit the offense of lewd conduct with a 14 year old. Under these circumstances, any uncertainty in the information amounted to no more than a defect of form. . . .

Lodgment 7 at 8-9.

Here, the information[6] specifically charged a violation of P.C. §§ 653f(c) and 288(c), and defined the elements of the crime. Further, at the preliminary hearing, Chambers was the only witness, and he testified about his telephone conversations with petitioner regarding the hiring of a 14 year old escort. CT 14-82. At trial, it was clear from the prosecutor's examination of Chambers, RT 70-93, and petitioner's cross-examination of Chambers, RT 93-136, that the focus of the case was on petitioner's telephone conversations with Chambers. Thus, petitioner was informed of the nature and cause of the charges against him so he could adequately prepare a defense in compliance with due process. Russell, 369 U.S. at 763-64, 82 S. Ct. at 1046-47; Calderon, 59 F.3d at 1008. Accordingly, the state courts' denial of this claim was neither contrary to, nor an unreasonable

---

[6] Count 2 of the information charged:

[Petitioner], in violation of Section 653f(c) of the Penal Code (SOLICITATION TO COMMIT SEXUAL ASSAULT), a Felony, did willfully, unlawfully and with the intent that the crime be committed, solicit JANE DOE to commit and join in the commission of SEXUAL INTERCOURSE, in violation of Section 288(c) of the Penal Code.

CT 103.

application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

VII

In conducting habeas review, a federal court is limited to deciding whether a conviction violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991); Engle v. Isaac, 456 U.S. 107, 119, 102 S. Ct. 1558, 1567, 71 L. Ed. 2d 783 (1982); see also Dugger v. Adams, 489 U.S. 401, 409, 109 S. Ct. 1211, 1216-17, 103 L. Ed. 2d 435 (1989) ("The availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.").

The entrapment defense "is not of a constitutional dimension." United States v. Russell, 411 U.S. 423, 430-33, 93 S. Ct. 1637, 1642-43, 36 L. Ed. 2d 366 (1973); Hampton v. United States, 425 U.S. 484, 489-91, 96 S. Ct. 1646, 1649-50, 48 L. Ed. 2d 113 (1976); Bueno v. Hallahan, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam); People of the Territory of Guam v. Teixeira, 859 F.2d 120, 122 (9th Cir. 1988). Rather, it is a court-created limitation on undesirable governmental activity. United States v. Emmert, 829 F.2d 805, 808 n.1 (9th Cir. 1987). Therefore, an alleged misapplication of law relating to entrapment does not raise a cognizable federal constitutional claim. Benson v. Carter, 396 F.2d 319, 322 (9th Cir. 1968), cert. denied, 393 U.S. 1080, 21 L. Ed. 2d 773, 89 S. Ct. 852 (1969); Eaglin v. Welborn, 57 F.3d 496, 501 (7th Cir.) (en banc), cert. denied, 516 U.S. 965, 133 L. Ed. 2d 338, 116 S. Ct. 421 (1995).

Nonetheless, due process may be violated when the State's conduct is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Russell, 411 U.S. at 431-32, 93 S. Ct. at 1643; United States v. King, 200 F.3d 1207, 1213 (9th Cir. 1999); Shaw v. Winters, 796 F.2d 1124, 1125 (9th Cir. 1986), cert. denied, 481 U.S. 1015, 95 L. Ed.

2d 498, 107 S. Ct. 1891 (1987). "This is an 'extremely high standard' for [petitioner] to meet," United States v. McClelland, 72 F.3d 717, 721 (9th Cir. 1995) (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991)), cert. denied, 517 U.S. 1148, 134 L. Ed. 2d 567, 116 S. Ct. 1447 (1996); United States v. Ahluwalia, 30 F.3d 1143, 1144 (9th Cir. 1994) (per curiam), and such unconscionable conduct generally occurs only when the State "'completely fabricates the crime solely to secure the defendant's conviction,' or . . . uses excessive physical or mental coercion." McClelland, 72 F.3d at 721 (citation omitted); Emmert, 829 F.2d at 811.

Here, in Ground Five, petitioner claims "there is no evidence from which a rationale trier of fact could properly have rejected petitioner's defense of entrapment, under the legal standard used in California, and petitioner's conviction thus violates the Fourteenth Amendment Due Process Clause." Petition at 7:10-14; Memo at 17:4-23:2. In other words, petitioner claims he was convicted in violation of due process of law because the evidence showed he was entrapped, as a matter of law; thus, there was insufficient evidence to support his conviction.

To review the sufficiency of the evidence in a habeas corpus proceeding, the court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); McMillan v. Gomez, 19 F.3d 465, 468-69 (9th Cir.), cert. denied, 513 U.S. 860, 130 L. Ed. 2d 107, 115 S. Ct. 170 (1994). All evidence must be considered in the light most favorable to the prosecution. Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; McMillan, 19 F.3d at 469. These standards are applied to the substantive elements of the criminal offense defined by state law. Jackson, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16; Panther v. Hames, 991 F.2d 576, 581 (9th Cir. 1993).

Under California law, "the crime of solicitation consists of asking another to commit one of the crimes specified in Penal Code section 653f, with the intent that the crime be committed." People v. Cook, 151 Cal. App. 3d 1142, 1144, 199 Cal. Rptr. 269 (1984); People v. Bottger, 142 Cal. App. 3d 974, 984, 191 Cal. Rptr. 408 (1983). "The crime of solicitation is complete when the solicitation is made, i.e., when the soliciting message is received by its intended recipient. It is immaterial that the object of the solicitation is never consummated, or that no steps are taken towards its completion." People v. Saephanh, 80 Cal. App. 4th 451, 460-61, 94 Cal. Rptr. 2d 910 (2000); People v. Bell, 201 Cal. App. 3d 1396, 1399, 248 Cal. Rptr. 57 (1988).

Entrapment is ordinarily a question of fact. People v. Barraza, 23 Cal. 3d 675, 691 n.6, 153 Cal. Rptr. 459, 468 n.6, 591 P.2d 947 (1979). As described by the California Supreme Court:

> The test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a normally law-abiding person to commit the offense. "Such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect--for example, a decoy program--is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

People v. Watson, 22 Cal. 4th 220, 223, 91 Cal. Rptr. 2d 822, 823, 990 P. 2d 1031 (2000) (citations omitted; emphasis in original); People v. Lee, 219 Cal. App. 3d 829, 836, 268 Cal.

Rptr. 595 (1990). Entrapment as a matter of law exists only "where the evidence is so compelling and uncontradicted the [factfinder] could draw no other reasonable inference." People v. Thoi, 213 Cal. App. 3d 689, 694, 261 Cal. Rptr. 789 (1989); Lee, 219 Cal. App. 3d at 836.

The California Court of Appeal, in rejecting petitioner's entrapment claim, held:

> [Petitioner] claims Chambers pulled the old "bait and switch" on him by advertising adult escorts and then talking him into a young girl. But that is not what Chambers did. When [petitioner] said he wanted an 18-year-old escort, Chambers repeatedly told him he should contact another agency if he wanted someone that age. Instead, [petitioner] stayed on the line, seeking to learn more about Chambers'[s] escorts. [Petitioner] jumped at the prospect of an underage escort, saying that a 14 year old would suit him fine. All Chambers did was play along with [petitioner] in terms of satisfying his desire for illicit sex. [Petitioner] did express some reservations during the phone calls. After all, he is an attorney, and he knew that there could be "lots of trouble with 14 year olds." But in the end, [petitioner] was willing to take the risk. Chambers merely provided him with a purported opportunity to do so. He did not badger or harass [petitioner], nor did he engage in any acts which would likely induce a normally law-abiding person to commit the charged offense.

Lodgment 7 at 10.

The petitioner has failed to rebut these findings by clear and convincing evidence; thus, they are entitled to deference. 28 U.S.C. § 2254(e)(1). Moreover, the California Court of Appeal's findings are amply supported by the record, especially the transcripts of petitioner's conversations with

Officer Chambers. CT 486-512. These conversations show that no law enforcement officer cajoled or importuned petitioner, or in any other manner overbore his will; thus, there was sufficient evidence to support the trial court's determination that petitioner was not entrapped, People v. Reed, 53 Cal. App. 4th 389, 400-01, 61 Cal. Rptr. 2d 658 (1997), as well as its conclusion that petitioner solicited Chambers so he, petitioner, could commit lewd and lascivious acts on a 14-year-old child. Bell, 201 Cal. App. 3d at 1399. Finally, the police conduct described above was not so shocking and outrageous as to violate due process of law. United States v. Mitchell, 915 F.2d 521, 526 (9th Cir. 1990), cert. denied, 500 U.S. 906, 114 L. Ed. 2d 81, 111 S. Ct. 1686 (1991); see also United States v. Johnson, 855 F.2d 299, 304-05 (6th Cir. 1988) (no due process violation when defendant responded to magazine advertisement offering to sell "Youthful Interests," corresponded repeatedly with postal inspector, and subsequently mailed child pornography to inspector). Accordingly, the state courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

VIII

Finally, petitioner claims he was denied "meaningful appellate review." However, this claim is grossly conclusory: Petitioner has failed to identify the specific trial court findings he claims were disregarded on appeal, or what evidence was overlooked on appeal, or what precedent was ignored on appeal. Since it is petitioner's burden to substantiate his claims with a particularized factual showing, Villafuerte v. Stewart, 111 F.3d 616, 631 (9th Cir. 1997), cert. denied, 522 U.S. 1079, 139 L. Ed. 2d 759, 118 S. Ct. 860 (1998); Jones v. Gomez, 66 F.3d 199, 204-05 (1995), and petitioner has not done so, this claim is without merit. Accordingly, the state courts' denial of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) adopting the Report and Recommendation as the findings of fact and conclusions of law herein; and (3) directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATE May 25, 2001

ROSALYN M. CHAPMAN

UNITED STATES MAGISTRATE JUDGE

Exhibit E

Judgment Of U.S. District Court,
Central District of California
(Entered June 29, 2001)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: MAY 25 2001
FILED: JUN 28 2001
ENTERED: JUN 29 2001
ENTERED ON ICMS: JUN 29 2001

CHRISTOPHER MORGAN, aka
CHRISTOPHER ALAN MORGAN,
Petitioner,

vs.

JOHN ROBINSON, Chief Probation Officer,
Orange County Department of Probation, et al.,
Respondents.
Case No. SACV 00-0434-AHS(RC)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of United States Magistrate Judge Rosalyn M. Chapman,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and the action is dismissed with prejudice.

DATE: June 27, 2001

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

R&Rs\00-0434.jud
5/25/01

Exhibit F

Opinion of California Court of Appeal Affirming Petitioner's Conviction (Nov. 30, 1999), With Order Amending Opinion On Denial Of Rehearing

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

FILED NOV 30 1999

NOT TO BE PUBLISHED

THE PEOPLE,
Plaintiff and Respondent,
v.
CHRISTOPHER ALAN MORGAN,
Defendant and Appellant.

G022374 (Super. Ct. No. 95WF1922)

OPINION

Appeal from a judgment of the Superior Court of California, County of Orange, William M. Monroe, Judge. Affirmed.

Michael B. Dashjian, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Matthew C. Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

Following a bench trial, Christopher Alan Morgan was convicted of soliciting lewd and lascivious conduct with a 14 year old. (Pen. Code, §§ 653f, subd. (c), 288, subd. (c).)1

---

[1] Unless noted otherwise, all further statutory references are to the Penal Code.

Morgan contends his conviction should be overturned because (1) his conduct was not illegal, (2) the purported "victim" was a fictitious person, (3) he was entrapped, and (4) the court erroneously limited his right to discovery. We affirm.

* * *

Throughout 1994 and 1995, officers in the vice division of the Huntington Beach Police Department placed a number of advertisements offering escort services in the business personals section of the Orange County Register. The ads were designed to assist the police in learning how escort services operate and to facilitate the investigation and apprehension of persons involved in sex crimes.

One of the ads offered "SCHOOLGIRL ESCORTS" and specified "Hotels OK 18+." On the afternoon of July 22, 1995, Morgan, a 57-year-old attorney, called the telephone number listed in the ad and left his name and number. Posing as an escort service operator, Detective Tim Chambers called Morgan back about an hour later and asked what he was looking for. Morgan said he liked slender, young women, around 18 or 19,with medium-sized breasts. He also expressed a preference for "shaved pussy."

Chambers said he specialized in young women and advised Morgan to contact another agency if he wanted an adult escort. Wanting to hear more about Chambers' agency, Morgan asked how old his girls were. Chambers replied, "Well, the best way I can answer that is that we find out as much as we can about what your particular needs are and we let you know if we'll be able to provide the service that you're seeking."

When Morgan said he liked young girls, Chambers asked him for an approximate age range. Morgan coyly answered, "Well, you tell me what you've got and I'll tell you." Chambers rejoined, "I'm pretty sure we don't have anyone as old as 18, but [] if that's what you're interested in, any of the other ads can get you that, and that's what I'd

suggest if that's what you want. If you want go younger, we can. If you want to go quite a bit younger, we can probably arrange that, as well."

Morgan replied, "Yeah, yeah. Well, you know, 14 is fine with me." Chambers said he had a girl named Kimberly that age and would page her to see if she was available for that evening. He then asked Morgan whether he was expecting a mere dancer or a "full service" escort. Morgan said he wanted the latter. He also admitted, "I really like young women [] but I've never talked to a service that would provide young women." He asked Chambers if he was a cop, and Chambers laughed and said no.

Chambers then inquired what Morgan wanted to do with Kimberly, which prompted Morgan again to ask if he was a cop. Chambers again said no, explaining he was simply trying to find out Morgan's specific interests. Morgan stated, "I'm very straightforward. I'm not into pain or humiliation or anything." Chambers responded, "That's what I meant. We're talking about just a straight sex type call." Morgan confirmed that was what he had in mind.

Asked by Chambers if he had any other special requests, Morgan said he liked short skirts and that "a schoolgirl's spirit would be nice!" Chambers retorted, "You're a man after my own heart. Got that Catholic schoolgirl fantasy. That one drives me crazy." After that, Morgan said he would be willing to pay $350 to have Kimberly come to his house. Chambers told Morgan he would page Kimberly and get back to him.

Forty-five minutes later, Chambers phoned Morgan and told him Kimberly was available. He then described Kimberly for Morgan, which led to the following exchange:

"[Morgan]: Look, I gotta be honest with you.

"[Chambers]: Um hum …

"[Morgan]: Ah … when something is too good to be true it … it usually is, you know.

"[Chambers]: Um hum...

"[Morgan]: This ... um ... you know, fantasy of mine, never followed through with it. You know, lots of trouble with 14 year olds as you know. Um ...

"[Chambers]: You're telling me! Believe me that's all we ...that's on our mind every minute, but ...

"(Morgan]: Yeah ...

"[Chambers]: But there's also a lot less competition in the market and a lot more money to be made so ...

"[Morgan]: Yeah ..."

"[Chambers]: You go where the money is and you just try to take your precautions.

"[Morgan]: I'll tell you what, we'll take it step-by-step here."

At that point, Morgan told Chambers to have Kimberly give him a call. When Chambers refused, Morgan said, "Okay, well then there's no way I'm gonna do it." However, Morgan changed his mind after Chambers told him it was not feasible for customers to talk to the escorts ahead of time.

Chambers then told Morgan that Kimberly would meet him at a Carl's Jr. restaurant in Fountain Valley and that he could then take her back to his house. Morgan told Chambers what kind of car he had and said he would be at the restaurant around 8 p.m.

Chambers went to the restaurant. At 7:53 p.m., Morgan pulled into the parking lot, stepped inside the restaurant momentarily and returned to his car. He then phoned Chambers and left a message that Kimberly was not there. Next, Morgan walked to the front of the restaurant and looked around before returning to his car and leaving. He left two more messages with Chambers that evening. In the second one he said, "Kimberly was not at Carl's Jr., but I'm still very interested, and I'm willing to give you the benefit of the doubt as to whatever might have happened. Why don't

you give me a call[.]"

Five days later, Chambers executed a search warrant at Morgan's residence. He found the newspaper ad for his phony escort service, as well as two short stories about minors having sex with adults. A computer image drawing of a young female and a brochure for ordering nude photographs of children were also found at Morgan's house.

I

Morgan was convicted of soliciting another to commit a lewd act on a 14 year old. He argues the conviction is a legal nullity because there is no such crime. We disagree.

Section 653f, subdivision (c) states, "Every person who, with the intent that the crime be committed, solicits another to commit rape by force or violence, sodomy by force or violence or any violation of Section 264.1 [commission of specified sex offenses while acting in concert], 288 [lewd act on child], or 289 [rape by foreign object], shall be punished by imprisonment in the state prison for two, three, or four years." (Hereafter § 653f(c).)

Section 653f(c) was enacted in 1979. (Stats. 1979, ch. 944, §9, p. 3257.) At that time, section 288 prohibited lewd conduct with a child *under* the age of 14. (§ 288, subd. (a).)[2] However, it did not prohibit lewd conduct with a 14 year old, the offense solicited in this case. That prohibition was added in 1988 and is set forth in section 288, subdivision (c).[3]

---

[2] Section 288, subdivision (a) states, "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

[3] Section 288, subdivision (c)(1) provides, "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15

Because this prohibition did not exist when section 653f(c) was originally enacted, Morgan argues it is not encompassed within section 653f(c)'s reference to section 288.

Morgan's argument is based on the "well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, ... such provisions are incorporated *in the form in which they exist at the time of the reference and not as subsequently modified* . . . . [Citations.]" (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59, italics added.) However, this principle "is not to be applied in a vacuum. The determining factor is legislative intent. [Citation.]" (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505.) In other words, we must decide whether the Legislature intended to prohibit solicitation of lewd conduct with a 14 year old.

The Attorney General contends such intent can be inferred from the fact the Legislature amended section 653f(c) in 1993. These amendments, the Attorney General insists, "specifically incorporated ... section 288 as it stood at the time of the amendment[] -- including subdivision (c) and including 14 year old victims. Actually, the 1993 amendments to section 653f(c) were very minor. The Legislature merely substituted the phrase "shall be punished" for "is punishable" and made a few other, nonsubstantive changes. (See stats. 1993, ch. 821, § 1.5.) These amendments did not relate to the issue of whether the offense of lewd conduct with a 14 year old should be encompassed within section 653f(c). Therefore, we are hesitant to read too much into them. (See Gov. Code, § 9605 ["Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The

---

years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year."

portions which are not altered are to be considered as having been the law from the time they were enacted; the now provisions are to be considered as having been enacted at the time of the amendment."]; *People v. Morante* (1999) 20 Cal.4th 403, 429 [amendments by implication are disfavored].)[4]

Although the intent of the 1993 amendments is somewhat shrouded, there is little question as to the underlying purpose of section 653f(c). That provision was enacted as part of Statutes 1979, chapter 944. Heralded as "the most significant piece of legislation concerning sex crimes" of the 1970's (*Review of Selected 1979 California Legislation* (1979) 11 Pacific L.J. 259, 429 [*Review*]), chapter 944 brought "sweeping changes in California law governing sex crimes." (*Id.* at p. 438.) As reflected in section 653f(c), chapter 944 added new sex offenses to the list of crimes covered by the solicitation statute and increased the penalty for the solicitation of certain sex offenses.

Chapter 944 also limited the availability of probation and increased penalties for a variety of sex offenses and made it easier for juvenile sex offenders to be sentenced to state prison. (See *Review*, *supra*, at pp. 429-435.) These measures were designed to strengthen the laws regarding child molestation and establish a legislative policy of "dealing more strongly with persons convicted of [sex] crimes." (*Id.* at p. 438.)

---

[4] We are mindful article IV, section 9 of the California Constitution states, "A section of a statute may not be amended unless the section is reenacted as amended." However, this provision is simply designed to "make sure legislators are not operating in the blind when they amend legislation, and to make sure the public can become apprised of changes in the law. [Citation.]" (*American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 749.) The provision is of little assistance in ascertaining the intent of the 1993 amendments to section 653f(c).

Notwithstanding these legislative objectives, Morgan argues it would be illogical to criminalize the solicitation of lewd conduct with a 14 year old because the solicitation of other sex offenses is not prohibited. He also relies on the fact that theoretically one could be punished more severely for soliciting lewd conduct with a 14 year old than actually committing such lewd conduct.[5]

However, the Legislature has broad authority to decide just what types of conduct are illegal and what penalties should attach to criminal behavior; we are not at liberty to judge the wisdom of these decisions. (*People v. Pecci, supra*, 72 Cal.App.4th at p. 1506 [upholding defendant's conviction for filming sexual conduct with a minor for noncommercial purposes although seemingly greater offense of filming for commercial purposes offered more lenient sentencing].) Despite any perceived inconsistencies in the statutory scheme governing sex offenses, one thing is evident: The Legislature clearly intended to broaden the reach of that scheme by enacting section 653f(c). Criminalizing the solicitation of lewd conduct with a 14 year old is entirely consistent with this intent.

This result also comports with the plain meaning of the statutory scheme as it existed when this case arose in 1995. (See generally *People v. Pecci, supra*, 72 Cal.App.4th at p. 1505 [courts should interpret the law according to the plain meaning of the terms used in the statute].) At that time, section 653f(c) prohibited the solicitation of any violation of section 288, and subdivision (c) of section 288 prohibited lewd conduct with a 14 year old. Anyone reading these two

---

[5] The maximum penalty for solicitation under section 653f(c) is four years, while the top 5 punishment for commission of lewd conduct with a 14 year old is three years. This discrepancy has no bearing on Morgan's actual punishment, as he was granted probation.

statutes would know that solicitation of lewd conduct with a 14 year old was illegal.

Consistent with both the underlying intent and plain meaning of section 653f(c),we find the Legislature has prohibited the solicitation of lewd conduct with a 14 year old. Therefore, Morgan was convicted of a valid criminal offense.

II

Morgan was charged with violating section 653f(c) by soliciting "JANE DOE (i.e., Kimberly) to commit and join in the commission of SEXUAL INTERCOURSE, in violation of Section 288(c) ..." However, as Morgan notes, section 653f(c) requires the solicitation of another person. Because Kimberly was not a real person, Morgan contends his conviction must be reversed.

Morgan technically may have been charged with soliciting Kimberly, but he clearly knew he was being tried for soliciting *Chambers* to arrange an illicit encounter with Kimberly. The evidence at both the preliminary examination and trial centered on Morgan's contacts with Chambers. And, the parties and the court proceeded on the assumption that the critical issue in the case was whether Morgan solicited Chambers to commit the offense of lewd conduct with a 14 year old. Under these circumstances, any uncertainty in the information amounted to no more than a defect of form, which Morgan should have attacked by demurrer. (*People v. Polowicz* (1992) 5 Cal.App.4th 1082, 1094.) His failure to do so constitutes a waiver of any objections, and the validity of the judgment is not affected. (*Ibid.*; *People v. Jordan* (1984) 155 Cal.App.3d 769, 782 [failure to demur waived defendant's complaint proper victim was not named in the information].)

III

Morgan next argues Chambers' conduct established entrapment as a matter of law. We are unconvinced.

In California, the test for entrapment is whether the conduct of the police was likely to induce a normally law-

abiding person to commit the charged offense. (*People v. Barraza* (1979) 23 Cal.3d 675, 689-690.) It is presumed such a person would typically resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity, e.g., a decoy program, is permissible. Overbearing conduct, such as badgering, cajoling, or other affirmative acts likely to induce a normally law-abiding person to commit the crime, is not permissible. (*Id.* at p. 690.)

"There will be no entrapment [] when the official conduct is found to have gone no further than necessary to assure the suspect that he is not being 'set up.' The police remain free to take reasonable, though restrained, steps to gain the confidence of suspects. A contrary rule would unduly hamper law enforcement; indeed, in the case of many of the so-called 'victimless' crimes, it would tend to limit convictions to only the most gullible offenders." (*People v. Barraza, supra*, 23 Cal.3d at p. 690, fn. 4.)

Entrapment is ordinarily a question of fact. (*People v. Barraza, supra*, 23 Cal.3d at p. 691, fn.6.) We will find entrapment as a matter of law only when "the evidence is so compelling and uncontradicted the [trier of fact] could draw no other reasonable inference." (*People v. Thoi* (1989) 213 Cal.App.3d 689, 694.)

In arguing entrapment, Morgan claims Chambers pulled the old "bait and switch" on him by advertising adult escorts and then talking him into a young girl. But that is not what Chambers did. When Morgan said he wanted an 18-year-old escort, Chambers repeatedly told him he should contact another agency if he wanted someone that age. Instead, Morgan stayed on the line, seeking to learn more about Chambers' escorts. Morgan jumped at the prospect of an underage escort, saying that a 14 year old would suit him fine. All Chambers did was play along with Morgan in terms of satisfying his desire for illicit sex. Morgan did express

some reservations during the phone calls. After all, he is an attorney, and he knew there could be "lots of trouble with 14 year olds." But in the end, Morgan was willing to take the risk. Chambers merely provided him with a purported opportunity to do so. He did not badger or harass Morgan, nor did he engage in any acts which would likely induce a normally law-abiding person to commit the charged offense. We therefore find no entrapment.

In a related argument, Morgan argues Chambers violated his due process rights because he had unfettered discretion in deciding how to talk to people who responded to his ad. Particularly, Morgan complains about the fact Chambers did not have any guidelines in deciding whether to pursue solicitation of prostitution, a misdemeanor, or solicitation of sex with a minor, a felony. Morgan does not articulate what type of guidelines Chambers should have been provided to assist him in making this decision. However, he suggests there was no legitimate basis for Chambers to pursue a felony in this case. He is wrong.

Chambers testified he carried out his investigations on a case-by-case basis and actually arrested more callers for misdemeanors than for felonies. His investigation of Morgan was based on various factors. First, the ad to which Morgan responded, "SCHOOLGIRL ESCORTS," was designed to pique the interest of persons looking for sex with minors. In addition, Morgan said he was interested in young women with no pubic hair. Because Chambers' investigati(n was dictated by the particular circumstances of the case, as opposed to whim or caprice, we find no due process violation.

IV

Lastly, Morgan asserts the court unduly limited his right to discovery materials on the issue of entrapment. Again, we disagree.

Before trial, Morgan requested discovery of all the taped conversations Chambers had with persons who

responded to his escort service ads. The court limited the request to those conversations arising from the ad used in this case. The prosecution produced three such conversations, but the court found only one of them was relevant to Morgan's entrapment defense.

Following Chambers' trial testimony, Morgan renewed his request for all of Chambers' taped conversations. He also asked for production of any complaints that had been registered against Chambers for police misconduct. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) The court denied Morgan's requests.

Morgan maintains he needed the requested materials to evaluate Chambers' veracity and determine whether he engaged in repeated and widespread misconduct during the course of the undercover sting operation. We might be inclined to agree had the evidence in this case been different. For example, if there had been conflicting testimony as to what Chambers and Morgan discussed on the telephone, evidence of Chambers' past behavior might have proved helpful in determining what he said to Morgan. However, because all the conversations in this case were recorded, there was no dispute as to how Chambers conducted himself. Under these circumstances, evidence of how Chambers handled other undercover investigations was irrelevant. The court therefore properly denied Morgan's discovery requests.

The judgment is affirmed.

WE CONCUR:
BEDSWORTH, J.
RYLAARSDAM, ACTING P. J.
SEYMOUR, J.*
*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FILED DEC 23 1999

THE PEOPLE,
Plaintiff and Respondent,

v.

CHRISTOPHER ALAN MORGAN,
Defendant and Appellant.

G022374 (Super. Ct. No. 95WF1922)

ORDER MODIFYING OPINION
AND DENIAL OF PETITION FOR REHEARING;
NO CHANGE IN JUDGMENT

The opinion filed November 30, 1999 is modified as follows:

At the end of section II, the following footnote is added:

"In a related claim, Morgan argues his conviction for solicitation must be reversed because he believed Kimberly was legally incapable of committing that offense. Morgan's argument is based on the assumption he was convicted of soliciting Kimberly. However, as we have explained, he was actually convicted of soliciting Chambers. Therefore, this argument necessarily fails."

This modification does not affect a change in judgment.

The petition for rehearing is DENIED.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P.J.
SEYMOUR, J.*

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

Exhibit G

Order of California Supreme Court Denying Review (March 15, 2000)

Fourth Appellate District, Division Three,
No. G022374

S085044

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

FILED MAR 15 2000

THE PEOPLE, Respondent

v.

CHRISTOPHER ALAN MORGAN, Appellant

Appellant's petition for review DENIED.

Mosk, J., and Kennard J., are of the opinion the petition should be granted.

GEORGE
Chief Justice

Exhibit H

Petitioner's Motion for Three-Judge Panel, Petition for Rehearing, and Suggestion for Rehearing En Banc, in the Ninth Circuit
[Re: Feb. 21, 2002 Order of Two-Judge Panel {Exh. A}]
(filed March 7, 2002)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER MORGAN, Petitioner-Appellant, v. JOHN ROBINSON, et al., Respondents-Appellees.	No. 01-56396 (C.D. Cal. No. SA CV 00-434 (AHS/RJC)

APPELLANT'S REQUEST FOR COURT CONSIDERATION OF MOTION; PETITION FOR INITIAL HEARING BY THREE-JUDGE PANEL (REHEARING); SUGGESTION FOR REHEARING EN BANC

Appeal From Judgment Denying Petition For Habeas Corpus
(28 U.S.C. § 2254)

United States District Court, Central District of California

The Honorable Alicemarie Stotler
United States District Judge

Michael B. Dashjian
LAW OFFICES OF MICHAEL B. DASHJIAN
P.O. Box 1270
Templeton CA 93465-1270
(805) 467-2200

Attorney for Appellant Christopher Morgan

TABLE OF CONTENTS

INTRODUCTION iv

ARGUMENT 1

1. A two-judge panel in a Court of Appeals has no jurisdiction to terminate an action; therefore, a two-judge panel has no jurisdiction to deny a Certificate of Appealability in its entirety, and the two-judge panel in this case acted without jurisdiction in doing so 1
2. The Rules of this Court do not permit a dispositive motion to be decided by less than three judges 6
3. A Court of Appeals has no jurisdiction to deny a certificate of appealability when the District Court has failed to provide a statement of reasons why the entire appeal fails to meet the requirements of a certificate of appealability 7
4. A Court of Appeals has no jurisdiction to deny a certificate of appealability in a habeas corpus case when the appellant raises an issue of whether the District Court's denial of the certificate of appealability was without jurisdiction, without first considering the jurisdictional issue and adjudicating it with a proper statement of reasons 10
5. If one or more judges of a Court of Appeals is going to terminate an appeal--here, by denying a certificate of appealability--it is duty-bound to provide a statement of reasons, and its failure to do so denies due process and invalidates the denial of the certificate 12
6. Appellant requests that a new panel be convened 13

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Allen v. Johnson, 391 F.2d 527 (5th Cir. 1968) (en banc) 2, 7, 10

American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) 8, 12

Black v. Romano, 471 U.S. 606 (1985) 8, 12

Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991) 8, 12

Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156 (1939) 2

Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977) 8, 9, 11

Goldberg v. Kelly, 397 U.S. 254 (1970) 8, 12

Herrera v. Payne, 673 F.2d 307 (10th Cir. 1982) 7, 8

In re Burwell, 350 U.S. 521 (1956) 5

In re Pedro T., 8 Cal.4th 1041 (1994) 14

Lara v. Nelson, 449 F.2d 321 (9th Cir. 1971) 9

Moran v. Dillingham, 174 U.S. 153 (1899) 11

Morton v. Mancari, 417 U.S. 535 (1974) 5

Murray v. National Broadcasting Co., 35 F.3d 45 (2d Cir. 1994) 4

People v. Cooper, 27 Cal.4th 38 (2002) 14

People v. Kirk, 217 Cal.App.3d 1488 (1990) 13

Slack v. McDaniel, 529 U.S. 473 (2000) 3

Swann v. Charlotte-Mecklenburg Board of Education,431 F.2d 135 (4th Cir. 1970) 10

Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) (en banc) 4

United States v. American-Foreign S.S. Co., 363 U.S. 685 (1960) 2, 7, 10

United States v. DeSimone, 140 F.3d 457 (2d Cir. 1998) 4

United States v. Martinez, 650 F.2d 744 (5th Cir. 1981) (per curiam) 8, 12

Whitehall Tenants Corp. v. Whitehall Realty Co., 136 F.3d 230 (2d Cir. 1998) 4

Wolff v. McDonnell, 418 U.S. 539 (1974) 8, 12

STATUTES

28 U.S.C. § 46 1-6

28 U.S.C. § 47 10

28 U.S.C. § 636 11

28 U.S.C. § 2253 ..... 5, 9

CONSTITUTIONS

U.S. Const., Art. III, § 1 2

COURT RULES

9th Cir. R. 27-1 6

Fed. R. App. P. 22 ..... 5, 7, 9

Fed. R. App. P. 27 1

INTRODUCTION

Counsel for the appellant certifies that in his judgment, this petition for rehearing properly directs this Court's attention to material points of fact or law overlooked in the two-judge panel order of February 21, 2002 disposing of this appeal. The issues are jurisdictional in nature, dealing with the power (or lack of power) of a two-judge panel to terminate an appeal by denying a certificate of appealability; the power of a Court of Appeals to terminate an appeal by denying a certificate of appealability when the District Court failed to provide an adequate statement of reasons; the requirement that a Court of Appeals denying a certificate of appealability must itself provide a statement of reasons; and the requirement that a Court of Appeals must determine whether the District Court's denial of a certificate of appealability was effected with jurisdiction before terminating an appeal by denying a certificate.

Further explication of these issues, all of which were overlooked in the two-judge panel's order terminating the appeal, Exh. A, may be found in the argument below.

The order of the two-judge panel for which hearing or rehearing is sought is attached as Exhibit A.

ARGUMENT

Appellant submits this request for hearing or rehearing as a Petition for Rehearing and Suggestion for Rehearing En Banc. However, since part of appellant's showing is that the two-judge panel which ruled that his COA should be fully denied didn't have jurisdiction to do so (because only a three-judge panel could do that), the matter may also be considered as a motion under Fed. R. App. P. 27(c) to have the Court review the action of a single judge, inasmuch as the two-judge panel's ruling had the same legal effect as a ruling of a single judge.

In either case, petitioner asks that the matter be heard by a properly constituted three-judge panel of this Court in order to confer jurisdiction on the Court; or alternatively, by the Court en banc.

The District Court's boldfaced conclusion that this appeal was untimely, Exh. B, is plainly in error, as the 30th day after entry of judgment fell on a weekend, and the Notice of Appeal was filed on the first weekday (Monday) following. That is discussed in appellant's moving papers, and will not be further referenced here.

1. A two-judge panel in a Court of Appeals has no jurisdiction to terminate an action; therefore, a two-judge panel has no jurisdiction to deny a Certificate of Appealability in its entirety, and the two-judge panel in this case acted without jurisdiction in doing so.

28 U.S.C. § 46 states that a Circuit may "authorize the hearing and determination of causes and controversies by separate panels, each consisting of three judges . . . ." (Underscoring added). The jurisdiction of a lower federal court,

including a Court of Appeals, is conferred by Congress and only exists in the manner that it is conferred by Congress. U.S. Const., Art. III, § 1; Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 159 (1939).

No Act of Congress grants a Circuit Court of Appeals the power to determine a cause by a two-judge panel. When--as here--the law requires three judges to act on behalf of a Court of Appeals, a panel of only two judges has no jurisdiction, because an order of a panel of two judges is not authorized by law to act as an order of a Court of Appeals. Section 46 establishes the jurisdiction of this Court by Act of Congress. Anything which falls short is not an action of this Court.

As a result, under the law, this Court has never considered appellant's applications. Rehearing--or perhaps more precisely, initial hearing--by this Court is thus respectfully requested.

Rehearing en banc is suggested because although appellant cannot verify it, he seriously doubts this is the only case in which a two-judge panel has denied a COA. He assumes it is commonplace, or else it would not have happened here. An issue of how many judges or which judges must sit on a panel, in a situation commonly faced by a Court of Appeals, is one of "importance to sound judicial administration" that therefore warrants en banc rehearing. Allen v. Johnson, 391 F.2d 527, 528 (5th Cir. 1968) (en banc); see also United States v. American-Foreign S.S. Co., 363 U.S. 685, 687 (1960) [question of which judges could

participate in decision of Court was "a question of importance to the Court[s] of Appeals in the administration of their judicial business"].

Appellant is aware that COAs are often granted by two-judge panels. There is clearly nothing wrong with that; a grant of a COA doesn't dispose of a case. By contrast, a denial of a COA does.

"[T]he tradition of a three-judge appellate court," Advisory Committee Notes to 1948 enactment of 28 U.S.C. § 46, more than a mere matter of technical form. Even if two judges by themselves might vote against a certain action, a panel of three judges--with the internal discussion and debate that characterizes the process of adjudication in a traditional three-judge panel--might reach a different conclusion. That is especially so when the application is merely one for a COA: A COA has a very low legal standard, see, e.g., Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), and a third judge might spot a reason why the standard is met even if the first two didn't. Or, even if a third judge was outvoted 2-1, he or she could file a dissent that might point to further action by the Court of Appeals en banc, or by the Supreme Court.

But whatever Congress's reasons for requiring that three-judge panels be assigned to dispose of cases in a Court of Appeals, Congress did require that three-judge panels be so assigned. A panel that never had three judges cannot dispose of an appeal, and does not act for the Court in doing so, under 28 U.S.C. § 46.

Congress enacted 28 U.S.C § 46(b) "to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels." Murray v. National Broadcasting Co., 35 F.3d 45, 47 (2d Cir. 1994). Thus, a matter disposing of an appeal must be assigned in the first instance to a three-judge panel. Id.; United States v. DeSimone, 140 F.3d 457, 458 (2d Cir. 1998). Here, that wasn't done, since it appears this Court did indeed assign this case to a two-judge panel, and the two-judge panel then issued a dispositive ruling. For purposes of granting a COA, that wouldn't be a big deal. For purposes of denying one, it is huge.[1]

True, a majority of an authorized three-judge panel is a quorum. 28 U.S.C. § 46(d). That provision permits two-judge panels to decide cases in unusual circumstances, such as the death of a judge after oral argument.

That provision, however, assumes ab initio the existence of a three-judge panel that was originally authorized (assigned) to hear the case. Accord, e.g., Whitehall Tenants Corp. v. Whitehall Realty Co., 136 F.3d 230, 232 (2d Cir. 1998). Here, no third judge was ever assigned to this two-judge panel, and no three-judge

---

[1] In petitioner's counsel's experience, the only other time he requested a COA (then a CPC) from this Court after having it denied by the District Court was a case in which the CPC was granted by a two-judge panel. That case ended up being reheard by this Court en banc, and adjudicated by an 8-3 vote. *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc). He has never seen a *denial* of a COA by a two-judge panel. However, he cannot assume this is the only case in which it has ever happened.

The requirement of a District Court to state reasons why it is denying a COA was relevant in the *Tolbert* case cited above. There, unlike here, the District Court did provide a statement of reasons (and a District Judge decided the motion).

panel was ever assigned to this case. Under section 46(b), there is no jurisdiction to dispose of this appeal in a two-judge panel.

Nor does anything in 28 U.S.C. § 2253 or Fed. R. App. P. 22 authorize the denial of a certificate of appealability, thus terminating an appeal, by fewer than the three judges required by 28 U.S.C. § 46. Section 2253(c) and Rule 22(b)(1) seem to refer to a single Circuit Justice or Judge "issu[ing] a certificate of appealability." (Underscoring added) They do not say anything to permit a single Justice or Judge to deny one. In any event, these laws--like all others--must be read in light of other existing laws in order to harmonize them. Morton v. Mancari, 417 U.S. 535, 551 (1974). Section 46 is one such law, and it admits to no exceptions: An assigned two-judge panel cannot dispose of an appeal.

The method of considering a motion for a certificate of appealability is within the discretion of a Court of Appeals, but only "in [a] way deemed appropriate by the Court of Appeals within the scope of its powers." In re Burwell, 350 U.S. 521, 522 (1956) [per curiam] (underscoring added). That begs the question of whether the method chosen--here, a two-judge panel issuing a ruling to deny a certificate--is within the scope of the Court's powers.

If the practice of denying a COA by two-judge panels occurs in more than just this case, the cause should be reheard en banc to determine if this Circuit should continue to utilize that practice in light of 28 U.S.C. § 46.

In any event, because appellant's request for a COA has not yet been considered by this Court inasmuch as the two-judge panel did not have jurisdiction to deny it in full, appellant respectfully requests an initial hearing or rehearing.[2]

2. The Rules of this Court do not permit a dispositive motion to be decided by less than three judges.

This is perhaps a corollary of (1) above. If under 28 U.S.C., 46, a matter cannot be disposed of in a Court of Appeals by a panel to which was assigned fewer than three judges, then a fortiori, a dispositive motion cannot be considered by a panel to which was assigned fewer than three judges.

Nonetheless, the issue also invokes an important question of this Court's local practice. Advisory Committee Note 3(c) to 9th Cir. R. 27-1 states: "All three judges of the motions panel participate in rulings that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they decide the motion." (Underscoring added)

Here, a denial of appellant's motion for a certificate of appealability would dispose of the appeal. Therefore, a three-judge panel was required to deny it. A two-judge panel had no jurisdiction to dispose of the appeal in that matter.

---

[2] In this petition, appellant treats the denial of his alternative motion to remand as part and parcel of the denial of his motion for a certificate of appealability, unless otherwise stated. He does so for two reasons: first, it was part of his effort to show in this Court that the District Court erred in its denial of his motion for a COA; and second, because denial of the motion to remand also ended up disposing of the appeal since the motion for a COA was also denied.

Once again, rehearing--or more particularly, an initial hearing of an authorized three-judge panel--is respectfully requested.

Rehearing en banc is suggested for the reasons in (1) above; for once again, although appellant cannot verify it, he seriously doubts this is the only case in which a two-judge panel has denied a COA. He again assumes it is commonplace, or else it would not have happened here. An issue of how many judges or which judges must sit on a panel, in a situation commonly faced by a Court of Appeals, is one of "importance to sound judicial administration" that therefore warrants en banc rehearing. Allen v. Johnson, 391 F.2d at 528 (en banc); see also United States v. American-Foreign S.S. Co., 363 U.S. 685, 687 (1960) [question of which judges could participate in decision of Court was "a question of importance to the Court[s] of Appeals in the administration of their judicial business"].

3. A Court of Appeals has no jurisdiction to deny a certificate of appealability when the District Court has failed to provide a statement of reasons why the entire appeal fails to meet the requirements of a certificate of appealability.

In Herrera v. Payne, 673 F.2d 307 (10th Cir. 1982), the Court of Appeals held that a District Court "statement of reasons" which did nothing more than incorporate the reasons in the original memorandum opinion denying habeas did not comply with the requirement of a Statement of Reasons in Fed. R. App. P. 22.

That is exactly this case, as appellant discussed in his alternative motion for remand. The District Court didn't provide a statement of reasons for denying the

entirety of appellant's application for a COA, which is attached as Exhibit B. The District Court merely referred back to its original opinion and concluded appellant had taken this appeal in bad faith. As Herrera v. Payne shows, that is not a valid statement of reasons.

A District Court's statement of reasons for denying a certificate of appealability is jurisdictional. Gardner v. Pogue, 558 F.2d 548, 550 (9th Cir. 1977). Under Gardner, a Court of Appeals does not have jurisdiction to deny a COA in its entirety when the District Court did not comply with the jurisdictional requirement of a statement of reasons.

That is this case. Rehearing is therefore requested.

More generally: The purpose of a statement of reasons is to show the adjudication has met the minimum requirements of law. Black v. Romano, 471 U.S. 606, 611-14 (1985), Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974); Goldberg v. Kelly, 397 U.S. 254, 271 (1970). A "statement of reasons" which fails to meet even that minimal standard is constitutionally inadequate and thus invalid. Ibid. Even under the most minimal due process standards, pro forma language and boilerplate statements do not suffice. E.g., American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 540 n.74 (1981); Castillo v. INS, 951 F.2d 1117, 1121 (9th Cir. 1991); United States v. Martinez, 650 F.2d 744, 745 (5th Cir. 1981) (per curiam). In that light, appellant respectfully submits that a summary denial of a

COA by a Court of Appeals (let alone by a two-judge panel) is inappropriate when the District Court has failed to provide a statement of reasons specific to the denial of the COA. Cf. Lara v. Nelson, 449 F.2d 321, 323-24 (9th Cir. 1971) (per curiam) [this Court could and did grant CPC when District Court denied it without required statement of reasons].

As this Court has held:

> "A decision by this court to consider whether to grant a certificate of probable cause might well result in a denial of the certificate. This 'would foreclose appellant from his first level right to a ruling by the district judge.' The absolute power of a district judge to allow a habeas appeal by granting a certificate of probable cause implies that the right to a 'first' level' ruling is substantive. An initial ruling by this court would upset the statutory framework of section 2253 and Rule 22(b) and infringe upon the rights of a state prisoner seeking habeas corpus relief." Gardner v. Pogue, 558 F.2d at 550.

Here, appellant made a substantive claim in his Alternative Motion to Remand, thoroughly supported with citations to authority, that the District Court's order denying a COA was entered without jurisdiction. Appellant was thus denied "his first level right to a ruling by a district judge [which] is substantive." Gardner v. Pogue, 558 F.2d at 550. Under Gardner, this Court would not have had jurisdiction to deny a COA under those circumstances.

Accordingly, rehearing is requested.

Rehearing en banc is suggested for reasons similar to (1) and (2) above. Appellant has no way to verify it, but he seriously doubts this is the only case in which a two-judge panel has denied a COA after a District Court denial of a COA that gave no more reasons than existed here. He again assumes it is commonplace, or else it would not have happened here. This too is an issue of "importance to sound judicial administration" that therefore warrants en banc rehearing. Allen v. Johnson, 391 F.2d at 528 (en banc); see also United States v. American-Foreign S.S. Co., 363 U.S. 685, 687 (1960).

4. A Court of Appeals has no jurisdiction to deny a certificate of appealability in a habeas corpus case when the appellant raises an issue of whether the District Court's denial of the certificate of appealability was without jurisdiction, without first considering the jurisdictional issue and adjudicating it with a proper statement of reasons.

The argument here is substantively the same as the argument in (3) above, incorporated here by reference.

Appellant notes here that in his view, he presented serious and substantial issues of jurisdiction. For example, for reasons set forth in appellant's Alternative Motion to Remand, the manner in which the District Court denied a certificate of appealability amounted to the Magistrate Judge reviewing her own ruling; the District Judge merely signed it, without stating the standards under which such review was conducted. The federal system has long rejected judges reviewing their own rulings. E.g., 28 U.S.C. § 47; Swann v. Charlotte-Mecklenburg Board of

Education, 431 F.2d 135, 137 (4th Cir. 1970); Moran v. Dillingham, 174 U.S. 153, 156-57 (1899). Or, there is the fact that the entire COA process in the District Court was done "off-docket" and nonpublicly, without any actual orders of reference to the Magistrate Judge who ended up reviewing her own ruling, or other compliance with the requirements of 28 U.S.C. § 636. Appellant has discussed all of this already in his Alternative Motion to Remand, and need not belabor it.

He does wish to say that these are particularly substantive matters when it comes to the substantive right of first-level District Court review on a motion for a COA. See Gardner v. Pogue, 558 F.2d at 550. Appellant has endeavored to show why he was denied proper first-level review, in accordance with the laws governing that review, in the District Court. He has now been denied review in this Court of the issue of whether he was denied review in the District Court, under the laws governing that review.

Accordingly, a hearing or rehearing by this Court is requested.

Rehearing en banc is also suggested because this too presents an issue of widespread significance with respect to this Court's business. Appellant has no way to verify it, but he greatly doubts that this is the only case in which there is a jurisdictional issue which isn't actually decided by a panel of this Court. An issue of widespread importance in the administration of this Court's business warrants en banc rehearing.

5. If one or more judges of a Court of Appeals is going to terminate an appeal--here, by denying a certificate of appealability--it is duty-bound to provide a statement of reasons, and its failure to do so denies due process and invalidates the denial of the certificate.

Generally, an order of a court disposing of an appeal must include enough information to provide the parties, and a possible future reviewing court (here, either the Ninth Circuit en banc, or the U.S. Supreme Court), with enough information to see the basis of the order. That was not provided here.

More generally, as described above: The purpose of a statement of reasons is to show the adjudication has met the minimum requirements of law. Black v. Romano, 471 U.S. at 611-14; Wolff v. McDonnell, 418 U.S. at 564-65; Goldberg v. Kelly, 397 U.S. at 271. A "statement of reasons" which fails to meet even that minimal standard is constitutionally inadequate and invalid. Ibid. Even under the most minimal due process standards, pro forma language and boilerplate statements do not suffice. E.g., American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. at 540 n.74; Castillo v. INS, 951 F.2d at 1121; United States v. Martinez, 650 F.2d at 745.

The two-judge panel's order here, Exh. A, manifestly fails the above due process standards for a statement of reasons. Accordingly, rehearing is requested.

Rehearing en banc is suggested, again, because appellant can't imagine that his is the only case in which a form-type order without reasons is used to deny a COA. This too presents a question of widespread importance in the administration of this Court's business, given the prevalence of COA applications in this Court.

6. Appellant requests that a new panel be convened.

This is a routine request in light of the fact that the current two-judge panel has already adjudged appellant's motion. If it were concluded that the two-judge panel lacked jurisdiction or otherwise wasn't empowered to issue the order it did, the cause should go to another three-judge panel to consider appellant's motions anew.

CONCLUSION

An application for a COA isn't supposed to be an early adjudication of the merits. Here, appellant requested a COA on matters that were thoroughly reasoned and researched. As a brief example, his first issue, (1) was of sufficient importance and potential merit as to receive two votes for discretionary review by the California Supreme Court; (2) had a published California opinion directly on point to the particular legislation underlying this case--a companion statute to the legislation underlying this case, § 10 in the same statutory enactment in which the statute in this case was § 9--which no court ever addressed in any opinion, but which appellant repeatedly cited since the state Court of Appeal briefs, People v. Kirk, 217 Cal.App.3d 1488 (1990) and (3) as his papers requesting a COA detail, he found six more published California opinions on point--and an opinion of this Court recognizing them--by the time this case got to the stage of requesting a COA.

(More recently, the California Supreme Court issued another opinion which supports appellant's view of this issue even under the law as it exists in 2002.

People v. Cooper, 27 Cal.4th 38, 44-46 (2002). Appellant's point that the law governing the 1979 legislation must be viewed as it existed in 1979, In re Pedro T., 8 Cal.4th 1041, 1048 (1994), hasn't yet been considered in any court.)

Obviously, appellant strongly believes in this appeal, and has no idea how or why every issue he raised is perceived not to meet the low standards for a COA. Unfortunately, no court has told him. The District Court gave no statement of reasons. Exh. B. Nor did the two-judge panel in this Court. Exh. A. And a two-judge panel is one less than is required to confer jurisdiction on this Court. Appellant cannot help but think that a third judge might have been able to help spot the merit in his issues, or at least might have helped with a statement of reasons.

This is certainly not an aspersion on the conscientious judges of this Court. It is simply that there are good reasons why Congress conferred jurisdiction on Courts of Appeal to dispose of cases only in panels of three judges.

And even if Congress's reasons hadn't been very good, they are still Congress's reasons. Congress has the final say on the jurisdiction of this Court. That jurisdiction has not yet been exercised in the manner prescribed by Congress.

Dated this 6th day of March, 2002.

Michael B. Dashjian
Counsel for Appellant Christopher Morgan

Exhibit I

Petitioner's Notice of Appeal to the Ninth Circuit (filed Monday, July 30, 2001)

Michael B. Dashjian (Cal. SBN 111072), Certified Appellate Law Specialist St. Bar of Cal. - Bd. of Legal Specialization
Dashjian & Dashjian
P.O. Box 1270 Templeton CA 93465-1270
Telephone: (805) 467-2200 Facsimile: (805) 467-1105
Counsel for the Petitioner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
01-56396

LODGED: JUL 30 2001
FILED: JUL 30 2001
Entered on ICMS 8/1/2001

CHRISTOPHER MORGAN, Petitioner, v. JOHN ROBINSON, et al., Respondents.	No. SA-CV-00-0434 (AHS/RC) NOTICE OF APPEAL; REQUEST FOR CERTIFICATE OF APPEALABILITY

TO THE COURT, ITS CLERK, AND THE PARTIES:

PLEASE TAKE NOTICE that the petitioner, Christopher Morgan, appeals from the judgment of the District Court in the above action filed on June 28 and entered on June 29, 2001, and from each part thereof.

In accordance with 28 U.S.C. § 2253(c), petitioner respectfully requests that this Court grant a certificate of appealability as probable cause for this appeal. This appeal is based on a substantial showing of denials of federal constitutional rights, such that reasonable jurists could debate whether (or for that matter, agree that) the issues raised by the petition for habeas corpus (i) were adequate to deserve encouragement to proceed further or (ii) should have been

resolved in a different manner than they were resolved in this Court; as shown in the accompanying Memorandum of Points and Authorities in support of the request for a certificate of appealability, incorporated by reference herein.

The request for a certificate of probable cause is, by law, addressed to the District Judge in the first instance. *See Holiday v. Johnston*, 313 U.S. 342, 350-52 (1941) [statute which by its "plain mandate" referred only to a habeas corpus function being discharged by a District Judge, did not permit Commissioner to perform the function and make a recommendation to the District Judge; plain language of statute required remand for proceedings before District Judge rather than Commissioner]; Fed. R. App. P. 22(b)(1) [specifically referring to issuance of certificate of appealability only by Circuit Justice or Judge, or District Judge]; *see also* Fed. R. App. P. 22(b)(2) and 9th Cir. R. 22-1 [request for COA is automatically sent to the Court of Appeals if District Judge denies it; if District Judge denies it in part, petitioner may move Court of Appeals for broader certification].

Petitioner requests that a certificate of appealability issue as to each and every one of the five legal issues he raised in his petition for habeas corpus, namely:

1. Is petitioner in custody in violation of the Constitution of the United States on the ground that he was convicted of a crime which was nonexistent in the jurisdiction that entered the conviction, in violation of the Fourteenth Amendment?

2. Is petitioner in custody in violation of the Constitution of the United States on the ground that the evidence was legally insufficient for a rational trier of fact to return a conviction of the "crime" charged against him in the accusatory pleading, for the reasons in Part II of his appellate briefs in the state court, in violation of the Fourteenth Amendment?

3. Is petitioner in custody in violation of the Constitution of the United States on the ground that the

evidence was legally insufficient for a rational trier of fact to return a conviction of the "crime" charged against him in the accusatory pleading, for the reasons in Part III of his appellate briefs in the state court, in violation of the Fourteenth Amendment?

4. Is petitioner in custody in violation of the Constitution of the United States on the ground that the evidence was legally insufficient for a rational trier of fact to return a conviction of the "crime" charged against him in the accusatory pleading on the ground that petitioner's entrapment defense was established as a matter of law, in violation of the Fourteenth Amendment?

5. Is petitioner in custody in violation of the Constitution of the United States on the ground that he did not receive meaningful appellate review of his legal issues in the state courts, in violation of the Fourteenth Amendment?

The above are the ultimate legal issues for which petitioner seeks review; they were also the issues petitioner raised in his original federal petition. These issues should also be construed to include all subissues fairly included within them. *See Lambright v. Stewart*, 220 F.3d 1022, 1031-32 (9th Cir. 2000) (Thompson, J., concurring).

In the alternative, petitioner respectfully requests that the Ninth Circuit Court of Appeals, or a judge thereof, grant the certificate of appealability as to each issue in (1)-(5) above, individually and together.

Respectfully submitted on Monday, this 30th day of July, 2001.

Michael B. Dashjian
DASHJIAN & DASHJIAN
P.O. Box 1270
Templeton, California 93465-1270
Telephone: (805) 467-2200
Facsimile: (805) 467-1105
Counsel for the Petitioner

Exhibit J

Constitutional, Statutory and Rule Provisions - Rule 14.1(f), (i)

PRIMARY CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS (Rule 14.1(f))

14th Amendment, United States Constitution

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law....

Title 28, United States Code, § 46 ["Assignment of judges; panels; hearing; quorum"]

* * * (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency....

Title 28, United States Code, § 636 ["Jurisdiction, powers, and temporary assignment"]

* * * (b)(1) Notwithstanding any provision of law to the contrary--....

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses....

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations

to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Title 28, United States Code, § 1254 ["Courts of appeal; certiorari; certified questions"]

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Title 28, United States Code, § 2253 ["Appeal"]

* * * (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 22, Federal Rules of Appellate Procedure ["Habeas Corpus and Section 2255 Proceedings"]

* * * (b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state

court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals....

Rule 27, Federal Rules of Appellate Procedure ["Motions"]

* * * (c) Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding....The court may review the action of a single judge.

Rule 6, Federal Rules of Civil Procedure ["Time"]

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. . . .

Rule 72, Federal Rules of Civil Procedure ["Magistrate Judges; Pretrial Orders"]

* * * (b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. . . . The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties....

* * * Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations....The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Ninth Circuit General Order 6.3(g) ["Disposition of Two and Three Judge Motions"]

(1) The following motions may be presented to two judges rather than the full panel if only two are participating. Any motions judge may vote to grant relief and so order. If all judges present agree that relief shall not be granted, they shall so order:

i. request for certificate of appealability . . . .

Ninth Circuit General Order 6.10 ["Motions for Clarification and Petitions for Reconsideration or Rehearing"]

The Clerk shall enter the receipt or filing of each motion for clarification and petition for reconsideration or rehearing of any order entered by ... [a] motions panel....

* * * Unless a case has been assigned to a specific panel....a motion for clarification of an order entered or a petition for reconsideration or rehearing of a motion previously considered by a motions panel shall be referred to the panel that entered the order in issue. . . .

Ninth Circuit General Order 6.11 ["Suggestions for Rehearing En Banc"]

The Clerk shall enter the receipt or filing of a suggestion for rehearing en banc of a motion previously considered by a motions panel....

* * * The suggestion shall be referred by the motions attorney to the panel which entered the order in issue. The panel may follow the relevant procedures set forth in Chapter 5 in considering the suggestion for rehearing en banc, or may reject the suggestion on behalf of the court.

Cal. Pen. Code § 288 (as existing in 1979, at time of enactment of 653f)

(a) Any person who shall willfully and lewdly commit any lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part I of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years. . . .

Cal. Pen. Code § 653f (as existing in 1979, at time of enactment)

* * * (c) Every person who solicits another to commit rape by force or violence, sodomy by force or violence, oral copulation by force or violence, or any violation of Section 264.1, 288 or 289, is punishable by imprisonment in a state prison for two, three or four years.

Cal. Pen. Code § 288 (current)

(a) Any person who willfully and lewdly commits any lewd or lascivious act...upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprison- ment in the state prison for three, six, or eight years....

(c)(1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. . . .

Cal. Pen. Code § 653f [current]

* * * (c) Every person who, with the intent that the crime be committed, solicits another to commit rape by force or violence, sodomy by force or violence, oral copulation by force or violence, or any violation of Section 264.1, 288, or 289, shall be punished by imprisonment in the state prison for two, three, or four years.

List of Local Circuit Rules and Procedures Re: Number of Judges Assigned to COA Applications

District of Columbia Circuit - 3 judges

Handbook of Practice and Internal Procs VII(C), (D), (E) - Clerk may not dispose of COA applications.

First Circuit - 3 judges

Bui v. DiPaolo, 170 F.3d 232, 238 n.2 (1st Cir. 1999)

Second Circuit - 3 judges

Local Rules 27(b), 27(d) - COA application is considered as a regular motion.

Local Rule 27(f) - COA application is not listed as a single-judge motion.

Third Circuit - 3 judges

Internal Operating Procedure ("IOP") 10.1 - All motions go to a panel.

IOP 10.5 - Lists all one-judge motions, which does not include COA applications.

Fourth Circuit - 1 judge to grant; 3 judges to deny

Local Rule 22(a)

Fifth Circuit - 1 judge, subject to rehearing by 3-judge panel

Local Rules 27, 27.2, 27.3; Fed. R. App. P. 27(c)

Sixth Circuit - 1 judge, subject to rehearing by 3-judge panel on which original judge doesn't sit.

Arredondo v. United States, 120 F.3d 639, 639-40 (6th Cir. 1997); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) [administrative order of Martin, J.]

Seventh Circuit - 1 judge to grant; 2 judges to deny, subject to rehearing by 3-judge panel

IOP 1(a)(1), 1(a)(2)

Eighth Circuit - 1 judge to grant; 2 judges to deny, subject to rehearing by 3-judge panel that includes all original judges

Local Rule 27B(b); IOP D(3)

Ninth Circuit - 1 judge to grant; 2 judges to deny

General Orders 6.3(g)(1), 6.10, 6.11

Tenth Circuit - 1 judge, subject to rehearing by 3-judge panel

Local Rule 27.5(A); Fed. R. App. P. 27(c)

Eleventh Circuit - 1 judge, subject to rehearing by 3-judge panel

Local Rule 27-1(d)(2), 27-1(g); Fed. R. App. P. 27(c)